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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 230

BESSER MANUFACTURING COMPANY AND JESSE H. BESSER,

Appellants,

vs.

THE UNITED STATES OF AMERICA

BRIEF ON BEHALF OF APPELLANTS

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Supreme Court of the United States

OCTOBER TERM, 1951

BESSER MANUFACTURING COMPANY AND JESSE H. BESSER, *Appellants*, *vs.* THE UNITED STATES OF AMERICA.	No. 230

BRIEF ON BEHALF OF APPELLANTS

Opinion and Judgment Below

The district court opinion (R. 1011)[1] is reported, 96 F. Supp. 304; the judgment (R. 1063) is not reported.

Jurisdiction

Jurisdiction is invoked under §2 of the Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272; 62 Stat. 989; 15 U. S. C. §29); and §2101(b) of the Judicial Code (62 Stat. 962, 28 U. S. C. §2101(b)).

The judgment below was entered April 12, 1951 (R. 1063). The appeal was allowed June 6, 1951 (R. 1148). This Court noted probable jurisdiction October 8, 1951 (R. 1178).

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[1] In this brief, the abbreviation "R." refers to the pagination of the printed record.

Statutes Involved

The Sherman Act (26 Stat. 209, 15 U. S. C.):

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .
>
> . . . . . .
>
> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Statement of the Case

The United States sued under §4 of the Sherman Act "to prevent and restrain continuing violations . . . of Sections 1 and 2 of said act" (R. 3). Defendants were Besser Manufacturing Co., Jesse H. Besser, Stearns Manufacturing Co., Inc., Louis Gelbman, and Hamlin F. Andrus (herein referred to as "Besser Co.," "Besser," "Stearns," "Gelbman," and "Andrus"). Besser Co. and Besser appeal.

The complaint charged that, beginning in 1931, appellants attempted to and did monopolize interstate trade and commerce in concrete block making machines; and that, beginning in 1942, appellants engaged in a combination and conspiracy with the other defendants to restrain and monopolize such trade and commerce (R. 5-6).

To support these charges the government alleged the acquisition by one or both appellants of certain business properties and patents; the making of a 1942 patent license agreement whereby defendants Gelbman and Andrus gave

appellant Besser Co. and defendant Stearns each a license, exclusive but for the other, under their patents; the purchase by appellants of a controlling stock interest in defendant Stearns; the "harassing" of competitors by appellants and their co-defendants; and the policy of appellant Besser Co. of leasing rather than selling certain of its concrete block making machinery (R. 6-9).

The opinion (R. 1011), adopted as the findings of fact and conclusions of law (R. 1063), rejected certain of the government's contentions, but sustained others against all defendants. It concluded that appellants had attempted to monopolize and had monopolized the concrete block making machine industry; and that appellants and their co-defendants had combined and conspired to restrain and monopolize interstate trade and commerce in concrete block making machinery by reason of the 1942 patent license agreement and the subsequent acts of the parties thereto (R. 1028-9).

The judgment (R. 1063-9) incorporated extensive and far-reaching provisions including, among others, a rigid schedule for the divestiture of appellants' stock holdings in defendant Stearns (R. 1064), the cancellation of the 1942 patent license agreement (R. 1065), the compulsory unrestricted licensing by all defendants, except Stearns, of all present patents and all future patents acquired or applied for in the next ten years (R. 1066-7), the creation of a sixteen month option in present lessees of appellant Besser Co. to terminate their leases of machinery and to buy them outright (R. 1068), and a novel provision that the compulsory license royalties be fixed by an extra-judicial "committee" designated in part by the government and in part by the defendants, with the judge, in case of disagreement, privileged to act as a fifth member, the committee's "report" to "become a part of this judgment just as though it were now included therein" (R. 1067). The post-judgment proceedings of this "committee" are summarized in the statement of facts (see pages 43-52, *infra*).

Questions Presented

I. Did the district court clearly err when it found and concluded:

(A) that Besser Co. and Besser unlawfully monopolized interstate commerce;

(B) that the 1942 patent license agreement and the subsequent attempts of the parties to protect their patent rights constituted an unlawful combination or conspiracy in restraint of trade and an attempt to monopolize?

II. Whether each of the following provisions of the judgment is unnecessary and inappropriate to restrain and prevent antitrust violations, as applied to the facts of this case:

(A) the attempt to make the judgment binding on the successors and assigns of each defendant, corporate and individual [Par. III];

(B) the requirement that appellants Besser Co. and Besser divest themselves within 80 days of the judgment of $1,000,000 worth of stock in defendant Stearns [Par. IV(A)];

(C) the declaration that the 1942 patent license agreement is null and void [Par. VI(A)];

(D) the injunction restraining all defendants "from conveying or receiving any patent rights under any license . . . which gives the licensee or licensees control over the number of licenses issued or to be issued" [Par. VI(B)];

(E) the injunction restraining all defendants from conveying or receiving any patent rights under any license or agreement "which has the same unlawful purpose and effect" as the 1942 patent license agreement [Par. VI(B)].

(F) the requirement that the defendants (other than Stearns) issue unrestricted and unconditional licenses to any applicant under all patents and applications presently owned or controlled by them and on all future patents issued or applied for within the next ten years [Par. VII(A)(B)];

(G) the proviso that the judgment should not prevent any such applicant from attacking the validity or scope of any of the said patents [Par. VII(D)];

(H) the requirement that appellant Besser Co. within 30 days extend to each lessee of one of its machines an option either to cancel or continue such lease or "purchase the machine or machines leased . . . as mutually satisfactory to the parties concerned" [Par. VIII(A)];

(I) the general injunction against violating the antitrust laws [Par. IX];

III. May a district judge lawfully (a) delegate the judicial function of setting compulsory royalty rates and license terms to a committee of four laymen, two of whom are financially and personally interested adversely to the appellants; (b) designate himself as a fifth member of the committee; (c) refuse to allow appellants an opportunity to present evidence relevant to value; and (d) by a 3-2 vote arbitrarily impose upon appellants royalty rates and license terms without the possibility of judicial review?

The Facts

A. The appellants' position with respect to the findings.

This Court, of course, reverses fact findings only when they are clearly erroneous (Fed. R. Civ. Proc. 52). Certain of the findings below are challenged on that ground. Appellants recognize, however, that some of the adverse find-

ings, though in appellants' opinion resulting from an incorrect appraisal of the evidence, have sufficient support in the record to rebut a contention that they are "clearly erroneous." Such findings the appellants, without conceding their correctness, accept on this appeal as a basis for the framing of appropriate relief.

So approaching this argument, the appellants in Point IV concede *arguendo* that the findings support a conclusion of an attempt to monopolize in violation of §2 of the Sherman Act, and in the same point outline the provisions of the judgment which are not attacked and which afford adequate and appropriate relief for such finding. In making this concession, the appellants of course reserve the right to contest these issues *de novo* if they should hereafter become material to a controversy in any trial court.

Appellants submit that the record does not support findings either of monopolization (as distinct from attempt to monopolize) or of combination and conspiracy in restraint of trade. The errors in the findings, they submit, flow from the trial court's erroneous view that virtually every act of the appellants after 1941 was the result of a vicious disregard of the law which led to a continuous course of predatory conduct. Such a view is not supported by this record. It is appellants' position that the opinion is basically faulty in this exaggeration, and that its errors carried over into excessive findings of law violations and harsh, inappropriate, and punitive provisions in the decree.

This approach does not invite this Court to try the case *de novo*. Appellants will confine themselves to developing those facts which show that the district court clearly erred in finding and concluding that appellants had a monopoly, that the 1942 patent license agreement was an illegal combination and conspiracy in restraint of trade, and that the attempts of appellants and their co-defendants to protect their patent rights constituted such a combination and conspiracy and, on appellants' part, an attempt to monopolize.

However, the principal thrust of appellants' appeal is directed to establishing that certain of the judgment provisions are inappropriate, discriminatory, arbitrary and punitive. The errors in the judgment result partially from the erroneous conclusions above outlined, but, even accepting *arguendo* the trial court findings, these provisions of the judgment cannot stand, as will appear from the facts and argument herein.

B. The industry.

This action concerns the manufacture and distribution of machinery for making concrete blocks. Such blocks are used for various structural purposes. Besser Co. and Stearns are manufacturers. Besser is the controlling stockholder of Besser Co. Gelbman and Andrus jointly own several patents used in some models of such machines.

Block machines may be divided between "tamping" and "vibrating" machines. These terms refer to the method of compacting the wet concrete aggregate in the molds which shape the blocks. In tamping machines, the aggregate is packed by tamper bars, working up and down, as it is fed into the mold. In vibrating machines the material is compacted by vibrating (*i.e.*, shaking) the mold (R. 911). Vibrating machines, developed in the late 1930s, are now more important in the industry than tampers (R. 43). Most manufacturers produce vibrators (Ex. 184, R. 1396, 999), but a substantial number of manufacturers make tamping machines (Ex. 183, R. 1395, 998, 1005). Only a very few companies, of which Stearns is one, make both types (Ex. 183-85, R. 1395-99, 998-1005). Since 1939 Besser Co. has made only vibrator machines (R. 909-10).

All concrete block machines, regardless of type or capacity, produce blocks which are useful for the same purposes. The blocks so produced are wholly fungible. All statistics are computed in terms of a standard block 8" x 8" x 16". While different sizes are produced for diverse uses, the several sizes have become more or less standard

by long usage, and any two blocks of the same size are completely interchangeable.

In 1946-1948, block machines were produced by over 40 companies:

NUMBER OF MACHINES PRODUCED AND SOLD, 1946-8 INCLUSIVE

	Tamping		*Vibrating*		*Total*	
Miscellaneous manufacturers	2041	79.6%	4770	86.4%	6811	84.3%
Stearns	522	20.4%	257	4.7%	779	9.6%
Besser Co.	0		490	8.9%	490	6.1%
Total	2563	100%	5517	100%	8080	100%

(Sources: Exs. 183-186, R. 1395-1400, 998-1004).

ANNUAL CAPACITY OF MACHINES PRODUCED AND SOLD, 1946-48 INCLUSIVE

(In thousand blocks)

	Tamping	*Vibrating*	*Total*
Miscellaneous manufacturers ..	716,877.6—75.1%	1,861,268—65.9%	2,578,146—68.3%
Stearns	238,080. —24.9%	278,976— 9.9%	517,056—13.7%
Besser Co.	0	682,200—24.2%	682,200—18.0%
Total	954,957.6—100%	2,822,444—100%	3,777,402—100%

(Sources: Ex. 187, R. 1401, 1004-5, percentages carried to first decimal)

Though all machines produce concrete blocks of various standard sizes which are consequently interchangeable, the machines themselves vary greatly in productive capacity and size. Besser Co. specializes in high production capacity vibrating machines. They are larger and hence more expensive than most of the competitive machines. The vibration process requires a heavy machine, weighing approximately 25,000 pounds against 15,000 for a tamper (R. 912). Moreover, the vibration process is somewhat slower than tamping (R. 896). To increase production while exploiting the superior vibration process, Besser Co. in 1939 developed a model which produced three blocks at a time (R.

896). Besser Co. has continued to move with the industry trend. In 1946 its largest machine produced 600 blocks an hour; in 1947 it introduced and made five machines of a new model with 750 hourly capacity; by 1948, 56 of the 87 machines it produced were of 750 hourly capacity, and 19 others were of 600 hourly capacity.

Because Besser's constant improvement of its product has thus made it a leader in the relatively recent introduction of multiple-block machines, the "dollar value" of its products naturally averages higher than that of most of its competitors, who have lagged in the introduction of these improved models.

DOLLAR VALUE OF MACHINES PRODUCED 1946-1948

	1946		*1947*		*1948*	
Non-defendants	$3,790,943	50.3%	$2,306,001	32.8%	$1,760,800	35%
Stearns	1,253,043	15.8	1,363,206	19.4	651,779	12.9
Besser Co.	2,692,500	33.9	3,366,500	47.8	2,623,000	52.1

(Source: Ex. 188, R. 1402, 1006).

The advances of technology, largely under the leadership of Besser Co., which have brought about the increased productivity of block machines, have resulted in cost savings which are reflected in the retail price of concrete blocks. For twelve to fifteen years prior to the trial, the retail cost has remained fairly constant at 16¢ to 17¢ per block (R. 955). The trial court discussed this evidence under the subhead "A Good Monopoly," and attributed the constancy of the price level not only to the increased productivity of Besser machines, but also to "the tough fiber of the competition, although limited, that refused to give up" (R. 1028). If the latter comment means that other companies have produced improved machines, the appellants concede the point. An efficiently managed company with competent engineering can, without infringement, produce high production machines, and a number have done so. But the evidence as to the retail price of blocks was not offered to show that this was a "good monopoly." It was offered to

show that the technological advances accomplished by Besser Co. and other competent companies had been a normal and necessary response to the demands of a free market economy, and had borne fruit in the increased usage of concrete blocks, virtually the only building material which had not been affected by the nation-wide inflation in construction costs.

The patent situation was the subject of much evidence at the trial. In the field of tamping machines, nothing is restricted by any Besser patent (R. 898). In the field of vibrators, the patent situation is more confused. Gelbman and Andrus jointly have several patents. Besser Co. has some. Other manufacturers rely on other patents and patent applications: e.g., the Gene Olsen Corp. on an O'Connor patent (R. 117); the Lith-I-Bar Co. on a Samuelson application (R. 384-5); the Darden Co. on a Darden patent and a Warren application (R. 475, 476, 530). From the welter of evidence, one fact emerges clearly: it is certain that both vibrating and tamping machines of all established capacities can be and are being manufactured and sold without infringement of the Gelbman-Andrus or the Besser patents (see R. 957-960, 967-8, 980-1).

C. Early history of Besser Co.

Besser Co., organized in 1897, since 1905 has devoted all its efforts, with the exception of two periods of war production, to concrete block machinery (R. 887-8; Ex. 3, R. 1183, 796). The defendant Besser, now nearly seventy years of age, worked in the business from its beginning, became secretary of the company in 1903 and president in 1925 (R. 887, 889). He and his wife own the stock of the company (R. 890; Ex. 4, R. 1184, 797).

The advance from the first wholly hand-operated machine making, with two men, 200 blocks per day, to the fully automatic machine making 6,000 blocks per day (both illustrated, Ex. 180, R. 1389, offered R. 892), resulted largely from the inventive genius of Besser (R. 893-5, Ex. 180, R.

1390, 892). Among the many developments of the company, one of the more important was the "plain pallet stripper," invented by Besser and covered by patent issued in 1929. This greatly simplified the production of blocks by eliminating time and labor incident to the passage of the material through the mold (see description, R. 895).

In 1929, 22 manufacturers reported production of block machines to the Department of Commerce (Ex. 109, R. 1308, 76-7). These included 10 to 12 important manufacturers. Most of these are still in business (R. 902-4), though between 1929 and 1931 the reporting manufacturers, under the impact of the depression, dropped from 22 to 18, and their reported "value" from $1,147,000 to $416,800 (Ex. 109, R. 1308, 76).

D. Consolidated Concrete Co. and Industrial Brownhoist purchases.

In 1931 Besser Co. purchased the stock of the Consolidated Concrete Co. of Adrian, Michigan, and in 1935 it bought certain assets of Industrial Brownhoist Co. The government charged that these purchases evidenced an attempt to monopolize trade in block making machines (R. 6). The trial court rejected both of these charges (R. 1017-8).

E. Flam patent license of 1938.

Plaintiff's third charge of attempted monopoly rested on an agreement between Besser Co. and one Stephen Flam in 1938. Other than the agreement itself, there is no evidence on this charge.

Flam or a company bearing his name manufactured a block machine, sold in the west and southwest, but "not used generally because it was restricted to a mix of concrete so wet" that it would not make acceptable standard blocks (Olsen, R. 290). In 1938 Flam owned nine patents (all of which expired prior to the trial) and one patent application.

In October 1938, Flam granted Besser Co. an exclusive license under these patents and the application, except that in nine western states Besser Co. received no license on machines having "hand operated stripping mechanisms" (Ex. 9, R. 1192, 798). A royalty per machine was specified, with an annual minimum of $3,000. Both parties were to use their best efforts to promote the business done under the license. Improvements by either party were to be licensed to the other party. Flam was to spend not over 90 days annually away from his residence in consulting service in the manufacture and sale of equipment falling under the license.

The trial court did not find anything unlawful in this license.

F. The 1942 patent license.

The charge of combination or conspiracy relates to a patent license by Gelbman and Andrus to Stearns and Besser Co. dated December 7, 1942 (R. 6-8).

(1) Gelbman-Andrus licenses to Olsen and Stearns, 1934-1942.

Beginning in 1934 Gelbman and Andrus licensed their patents exclusively to Eugene F. Olsen (Ex. 111, R. 1310, 95-7). Olsen, a principal government witness, and one of the government's "arbitrators" on the post-judgment royalty "committee," has been almost continuously in the block machine business since 1919 (R. 56, 256). In the late 1920's he was president of Consolidated Concrete Co. (R. 70, 262, 270, 272). After the Besser purchase, Olsen continued with Consolidated and Besser Co. until 1932. In 1934 he reentered block machine manufacture, in 1936 incorporating the defendant Stearns, of which he was principal owner and president until 1948 (R. 92, 97-8, 150, 602, 604). Having sold his stock in Stearns for over $800,000 in April 1948, he incorporated the Gene Olsen Corp. on June 1, 1948 to manufacture block machinery (R. 55, 116). He is president and principal owner of that company (R. 110).

Between 1934 and 1939 Olsen's Stearns Co. passed Bessel Co. in total sales. In 1937 Olsen began making vibrating machines (R. 92). Stearns total sales for 1939 were $375,089, including 105 block machines sold for $205,717; as against Besser Co. sales of $356,910, including 52 block machines sold for $243,856 (Exs. 1, 2, R. 1179, 1180; 100, 101). In the same year, reporting manufacturers produced 1627 machines of a "value" of $1,092,006 (Ex. 113, R. 1337, 98). There is no showing that the "*value*" of machines "*produced*" is comparable to the *price* of machines *sold*. Consequently there is no way accurately to figure percentages, though it is undisputed that Stearns and Besser Co. were two of the leaders in the industry in 1939.

On March 1, 1940 Gelbman, Andrus, Olsen and Stearns entered into a new agreement, granting Stearns an exclusive license (except for New York City) on four patents and three applications, and any improvements, without power to assign or sublicense. Olsen and Stearns agreed to disclose and assign to Gelbman and Andrus all inventions made previously or during the contract term by Olsen or any company with which he was connected (Ex. 112, R. 1323; R. 95-7). From this provision resulted three patents and one application carrying Olsen's name (R. 352-3; Ex. 10, R. 1202, 98).

Neither Besser Co. nor Besser was concerned or involved in any of these agreements.

(2) Gelbman, Andrus and Stearns sue Besser Co. customer.

In 1940, Gelbman, Andrus and Olsen, through Stearns, brought a suit against H. W. Bell & Co., Inc., a Besser customer in New York, alleging infringement of a patent which expired prior to the antitrust case (R. 30, 94, 855). Olsen participated for Stearns (R. 145-6). The district court found for the defendant, and the plaintiffs appealed (R. 94, 147, 337, 855).

This litigation was settled by the license of December 7, 1942 (Ex. 10, R. 1201; R. 98). This settlement was promoted

by Olsen, and the agreement was drafted in New York by the patent counsel for Stearns, Gelbman and Andrus (R. 146, 855-6).

(3) Terms of 1942 license.

The plaintiffs dismissed their appeal and waived any claim against Bell. The 1940 license to Stearns was cancelled. Licenses were issued to Stearns and Besser Co., each being (except for the other company) exclusive and nonassignable. The license covered the patents previously licensed to Stearns, and also three United States patents and one application issued to or filed by Gelbman, Andrus and Olsen subsequent to the Stearns license. It also covered any improvements or inventions made by the licensors in concrete block making machinery, any such improvement licenses terminating on July 1, 1952. It provided that during its term the licensors would grant further licenses only with the consent of the licensees. Royalties ranged from $225 to $75 per machine, depending on the size of the machine. Unlike the earlier Stearns agreement, it contained no provision giving Gelbman and Andrus any claim on the inventions of the licensees.

By this license the prior status in which Stearns was the exclusive licensee was superseded by a status in which Stearns and Besser Co. each had a license, exclusive save for the other. Olsen, appearing for the government, stated unequivocally that there was no discussion of "keeping out other manufacturers," other than that the parties understood that their rights to the patents were exclusive (R. 150).

G. Scott and Wellnitz patents.

In 1938 one Scott obtained a patent pertinent to vibrating machinery (R. 93; Ex. 162, R. 1378, 788). This patent, referred to during the trial as the "Scott" patent, was purchased in 1947 by Besser Co. (R. 93, 96, 990).

During the trial there was passing reference to a "height and density control" patent known as the "Wellnitz" pat-

ent, also owned by Besser Co. (R. 941, 943). This was a new patent (R. 941).

There is no allegation, evidence, or claim that Besser Co.'s acquisition of either of these patents was illegal in its inception, its motivation, its consummation, or its effect.

H. Efforts to protect patent rights.

The government charges as an offense that the defendants (which includes Stearns) harassed their competitors by assertion of their patent rights (for detailed charge, see R. 8-9).

A fair appraisal of the evidence on the question of patent infringement is essential. This statement is subdivided as follows:

(1) The patents of defendants were being infringed;

(2) The defendants in good faith, and with reasonable grounds, believe their patents valid and infringed;

(3) The economic climate in 1946-48 put a premium upon operators prepared to risk infringement;

(4) In this situation, the defendants (including Stearns) attempted to protect their patents.

(1) The patents of defendants were being infringed.

The government called nine manufacturers or builders of block machines: Olsen, Graveley, Winn, Hanneman, Milewski, Samuelson, Randolph, Darden and Warren.

Olsen, whose extensive experience has been outlined above, testified:

> "*It is my opinion that there is not a large number who are making such machines* (i.e., concrete block making machines) *and who are not infringing the*

Gelbman and/or Scott patents . . . It would be very few, if any.

"The Court: *But you claim your own is not, don't you?*

"A. *No, I have not claimed that . . .*

"The Court: You don't think, according to your statement, that you infringe, as far as your machine is concerned, either the Gelbman or Scott patents, if those claims are good? Even if they are valid claims?

"A. *If they are valid, it is my personal opinion that we may be infringing on some part of it*" (R. 319-20).

While Olsen was president of Stearns, from 1942-1948, and licensed under the Gelbman patents, numerous claimed infringements came to his attention and he urged Gelbman to protect his patents (R. 150; Exs. 13, 22, 52, 54, 68, 70, 81, 88, R. 1211, 1218, 1259, 1261, 1268, 1270, 1279, 1283, offered R. 799-801, 804, 814, 809, 811, 815).

Graveley, who manufactured only three automatic vibrating machines (R. 181), did not deny infringement. He stated that, if sued, he would attack the validity of the patents (R. 166).

Winn did not deny infringement. His position also was that the patents were invalid (R. 206-7). His testimony that one prospective customer would not buy without a guarantee against suit (R. 213)—a normal precaution in a complex patent field—omits any statement that he was willing to give such a guarantee. His machine was substantially the same as the Milewski Lith-I-Block machine (R. 201, 207), which later was held by the district court to infringe (see next subsection).

Hanneman consulted his own patent lawyer (R. 247), and thereafter sought and was granted a license to make enough machines to "get my money out of the set-up" (R. 221-22, 247). His machine, with the exception of the controls, was

the same as marketed by Besser, Stearns, and Milewski (R. 239).

Milewski, president of Lith-I-Bar Company which manufactured the Lith-I-Block machine (R. 383), could not be expected to concede infringement, since certain of his customers were defendants in infringement actions undecided at the time of this trial (R. 401). In those cases the district court held that there was infringement (see next subsection).

Samuelson was directly involved with Milewski, since his 1946 patent application was relied on by Milewski (R. 383, 438). The adjudication of infringement by Milewski thus reaches Samuelson.

Randolph, not a manufacturer, built one machine for his own use, after having used a Stearns machine (R. 445). At meetings in his plant, one attended by Olsen, the "general theme . . . was the fact that [he] might be infringing," but that he had no intention of manufacturing for sale (R. 447-9).

Darden, who began manufacture in 1944, had previously been superintendent of a block plant using two Stearns machines, which he knew were patented (R. 471, 502). He admitted his machine embodied the ideas of the Stearns machines (R. 502). It was his opinion that the Gelbman patents were not good, but he evaded the judge's question whether, assuming they were good, he infringed (R. 524). As a government representative on the "royalty committee," Darden concurred in setting royalties running as high as $187.50 per machine for the Gelbman-Andrus patents (R. 1072). His conduct from 1944 through the post-trial proceedings is consistent only with a recognition that, if the patents were valid, his activities, before he was licensed, were infringing.

Warren was not a manufacturer. In the early 1940's he bought a Besser tamping machine which he converted into a vibrating machine (R. 540). In 1945-1947 he made for his

own use three "Warren 800" machines. In 1946 he applied for patents which at the date of trial had not issued (R. 529-30, 540, 541). Thereafter Darden made these machines (R. 537). Warren stated, of conferences in Knoxville in 1947 with Besser, Stark and Darden, that "at that time we did not feel that we were infringing" (R. 533).

Of the nine witnesses:

The machines in which Milewski and Samuelson were interested were later held by the district court to infringe the Gelbman patents.

Six did not deny infringement if the patents were valid: Olsen, Grayeley, Winn, Hanneman, Randolph and Darden.

Warren expressed a carefully worded opinion that in 1947 he did not think his machine was infringing.

(2) The defendants in good faith and with reasonable ground believe their patents valid and infringed.

Before the trial of this case began, actions had been tried and were awaiting decision, in the same district and before the same judge, charging infringement of two of the Gelbman-Andrus patents and the Scott patent by the Milewski-Samuelson Lith-I-Block machine. The district court subsequently held that the Scott patent was valid, but not infringed, and that the two Gelbman-Andrus patents were valid and infringed. (*Andrus* v. *Whitman*, 93 F. Supp. 383 (E. D. Mich., 1950.))

On February 19, 1952, the Court of Appeals for the Sixth Circuit affirmed in part and reversed in part, holding the claims urged under both the Scott and the Gelbman patents invalid. *Whitman* v. *Andrus*, unreported (6th Cir., Feb. 19, 1952). Application for a writ of certiorari is now in preparation.

The last word in the patent actions has not been spoken. But assume *arguendo* that counsel for the defendants were mistaken in their opinions that the patents were valid: the

defendants certainly had a reasonable basis for this belief, since they were sustained by Judge Picard on a full record in the patent actions, after he secured further enlightenment in the course of the antitrust trial.

(3) The economic climate in 1946-1948 put a premium on operators prepared to risk infringement.

The years immediately following the war were particularly tempting to operators prepared to accept the risk of patent infringement. Stimulated by wartime shortages, an unprecedented demand developed for building materials, including concrete blocks. "A great many people . . . started small block plants with low cost equipment and also little capacity" (Olsen, R. 298). During the war there developed a shortage of block making machinery, with a resultant post-war surge of demand (Winn. R. 215). Numerous individuals and companies rushed into the manufacture of concrete block machinery. As Olsen said, "the mortality rate was nearly 100% after that" (R. 298). Typical are some of the witnesses selected by the government:

Graveley began manufacturing low cost machines in 1945, with sales in 1946 of $300,000; 1947, $69,500; and 1948, $29,800 (R. 152, 157). He prospered "when the trade would accept hand operated machinery" (R. 168). His gross sales of all products in 1946 exceeded $1,000,000 (R. 197). He made only three fully automatic machines, two of which were sold for export (R. 181). By the date of trial, Graveley was making metal awnings (R. 152), and another company was operating in his former plant (R. 175). No one from his successor testified.

Winn manufactured block machines from 1946-1950, then became a contract engineer (R. 198). Winn named his company the Vibra-Tamp Co. and his machine "Vibra-Tamp" (R. 199), an obvious effort to capitalize on the long established Besser trade name "Vibrapac." The resulting confusion probably accounts for the testimony of the govern-

ment witness Goldcamp that he had a "Besser Super Vibra-Tamp" (R. 355).

Hanneman, a former tavern and fair park operator (R. 227), was a "manufacturer" of block machines from 1946 to 1948, and at the time of the trial was a building superintendent (R. 217). Aside from three machines built for him by a former Besser employee, Hanneman had made one machine for which he had not been paid because, though some two years had elapsed since the sale, he had not completed it so it would work (R. 225-6, 237).

Milewski produced his first automatic vibrating machine in 1946, delivered 2 in 1946, 27 in 1947, and 45 in 1948 (R. 384). He made only one model (R. 383), the one adjudicated to infringe.

Darden began manufacture of block machines in 1944 (R. 471) and in 1946 began to make the "Warren 800" (R. 473).

This sudden influx of manufacturing talent should be appraised against the fact that Olsen, with a 15 year background and a license under the Gelbman patents, in 1934 required several months to design a simple tamping machine, and over a year additional to develop his more advanced machine, and not until 1938 was his model fully developed (R. 283-4, 295). As Olsen said, and the experience of the witnesses proved, "if you have not built one before, you make a lot of mistakes" (R. 284).

(4) In this situation, the defendants (including Stearns) attempted to protect their patents.

It is undisputed that when this flood of new "manufacturers" struck the industry, the defendants demanded that their patent rights be respected. The evidence shows that Stearns, under Olsen's presidency, was extremely active. This is significant, since the court, while not distinguishing in its opinion between the defendants, in its judgment did not require Stearns to open even its present

patents to compulsory licensing, but ordered Besser Co. and Besser to license not only existing patents but all patents developed for ten years in the future (R. 1066-7).

(a) *Investigation.*

The record shows that every approach by Besser Co. or Besser to a claimed infringer rested on knowledge of that maker's actual or contemplated product:

Olsen, while president of Stearns, actively attempted to compel respect for the Gelbman-Andrus patents, in some of which his own name was included (see pages 13, 16, *supra*). Naturally, therefore, he recognized the patent problem in 1948 before he began manufacture in his new corporation (R. 117-8). In that summer Gelbman, a close associate of Olsen since 1934, met Olsen in Adrian, Michigan, several times, and they discussed the patents (R. 117-8). In December one Bailey of Besser Co. visited Olsen's factory while the first machine was being assembled, and discussed the patent situation (R. 119-20). These several visits elicited full knowledge of Olsen's plans, though this hardly seems crucial since Olsen admitted that if the patents were valid he was probably infringing (R. 319-320).

Machines in operation were inspected with respect to *Graveley* (R. 181-2, 185);[2] *Milewski* (R. 387) and *Samuelson* (R. 440).[3] *Warren's* machine was inspected (R. 533). *Winn's* machine was seen in assembly at Winn's plant (R. 203-7). The government witness Lloyd testified to visits in company with one Thompson, a Besser representative, to two persons in Birmingham who were making machines. Thompson carefully inspected the machines at both places before talking with their makers (R. 553-4).

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[2] Gelbman was requested by a Graveley customer to see if he could make the machine operate. One of Gelbman's sons spent several days trying to make it work (R. 884).

[3] Stearns representatives had seen a Milewski machine as early as November 1946, though it was not in operation and the "men were not very cordially received" and could not get full details. (Stearns to Gelbman, November 20, 1946, Ex. 84, R. 1280, 811).

Hanneman's first machine, built by one Leemon, a former Besser Co. employee, "didn't work too well" (R. 221). Hanneman asked Besser Co. to put it in working order, which Besser agreed to do (R. 221, 243). Stark and a Besser salesman inspected one of the Leemon machines at Charlevoix (R. 438-9). Some months after Hanneman's visit to Besser, Stark called at Hanneman's plant and discussed the claimed infringements (R. 221). Obviously Besser Co. was fully informed as to the Hanneman machine.

Randolph's machine was discussed at two conferences in his block plant (he made blocks, not machines) at Ann Arbor, Michigan (R. 447-8). While a physical inspection is not mentioned, it would be incredible to suppose that the parties did not examine the machine they were discussing, located within the very plant where they met.

Darden's machines were fully investigated. Early in 1946, when Gelbman advised Darden of his infringement, Gelbman had a picture of the Darden machine (R. 477). This was at a convention in Chicago, at which Gelbman told Olsen that Darden's machines "are a definite infringement" (Ex. 52, R. 1259, 814). Shortly after the convention, Besser visited Darden in Atlanta, and then came to "New York for some information and copies of [Gelbman's] patents. [Gelbman] gave him the information he wanted and [Besser] went back to Atlanta for further investigation" (Ex. 53, R. 1260, 807). Darden confirmed that he conferred with Besser in Atlanta (R. 478-9). In October 1946, Fox of Besser Co. met Darden in Atlanta, Darden gave him a full description of the machine, and Fox went over with Darden the various patents (Ex. 19, R. 1215, 813-4). On November 4 Gelbman had a report of International Service Corporation on the Darden machine (Ex. 67, R. 1267, 808).

The finding of reckless and uninformed charges of infringement (R. 1024) is further negatived by exhibits which were ignored in the opinion:

In October 1947, Olsen for Stearns wrote Gelbman urging action against users of an F. C. George Machinery Co. machine if investigation revealed that litigation was indicated (Ex. 88, R. 1283, 815). Besser Co. ignored this letter (Ex. 89, R. 1284, 811) until about November 24, when Stark urged that before any decision was made they should see a George machine in actual operation (Ex. 91, R. 1285, 812).[4]

The same attitude is reflected in Stark's letter to Columbia Machine Works of Vancouver, Washington, February 7, 1948 (Ex. 95, R. 1291, 815-6). Besser visited the Columbia plant, and Stark sent Columbia copies of two Gelbman patents and the Scott patent for inspection and consideration by Columbia and its patent counsel. Stark pointed out that since he had not inspected the Columbia product, he could not advise as to whether or not the company might be "innocently operating" under other patents. He anticipated a visit later to Vancouver, when he would go over the matter in more detail, "subject to confirmation, of course, by an attorney of your own choosing" (Ex. 95, R. 1291, 815-6).

Precisely the same type of letter was written on February 3, 1948 by Stark to Scripps-Pearson Machinery Co. of Edmonds, Washington (Ex. 98, R. 1295, 812).

(b) *Notices of Infringement.*

(i) **Conversations with manufacturers.**

It is undisputed that some block machine manufacturers were advised by the defendants of their belief that their patents were infringed. In most instances this advice was

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[4] In December, 1946, Gelbman authorized his patent attorney to send a notice of infringement to F. C. George Machinery Co. (Ex. 72, R. 1273, 809-10). Gelbman described at the trial the respects in which the George machine infringed his patent (R. 883). In November, 1947 Gelbman notified George Co. that its advertised machine infringed and requested the location of the nearest one so he could inspect it (Ex. 90, R. 1285, 811-2).

given at the plant of the claimed infringer. At least six were shown, and four were supplied with copies of the patents, at least one with the claimed infringements indicated by check marks (Olsen, R. 120; Graveley, R. 159; Winn, R. 203; Hanneman, R. 221, 247; Milewski, R. 387; Samuelson, 439; Randolph, R. 447; Darden, 477, 478; Warren, R. 531, 532; the Birmingham individuals, R. 553-4; Columbia Machine Works, Ex. 95, R. 1291, 815-6; Scripps-Pearson Machinery Co., Ex. 98, R. 1295, 812). After investigation, it was concluded that Scripps-Pearson was not infringing (R. 968). Apparently the same conclusion was reached in reference to Columbia Machine Works, after an exchange of views by the lawyers (Exs. 96, 97, R. 1292, 1294, 816, 812). Randolph made it clear that he did not expect to manufacture his infringing machine for sale, and the matter was dropped (R. 449).

(ii) Discussion with customers.

Some admissible evidence was offered that persons connected with the defendants mentioned to four block machine users the claim that certain competitors' machines violated patents.

In 1948 the witness Miller was interested in a machine, "and a lot of other people wanted to sell me one" (R. 51). Miller informed the Besser salesman that he was going to buy a Lith-I-Block machine. This was the Milewski machine which had been inspected in operation in May, 1947 (R. 387), and with respect to which an infringement suit later was prosecuted and a finding of infringement made in the lower court. Miller says the salesman advised him against the machine on three grounds: first, it produced an inferior block; secondly, it violated patents, so that a user would be liable for infringement; and thirdly, the manufacturer would not remain in business (R. 52-3). The impact of this sales talk is evidenced by the fact that Miller proceeded to buy the Lith-I-Block machine (R. 53).

The witness Goldcamp, in December 1948, entered negotiations to change from a small to a large Besser machine (R. 356). On January 26, 1949 he and Besser Co. executed a lease contract covering equipment valued at $62,185, and he paid $2,000 (R. 356-7, Ex. 136, R. 1351, 380). Nevertheless, Goldcamp on February 2 made a deal with Olsen to install a Gocorp vibrating machine on a 45-day trial basis, and stopped payment on his check to Besser (R. 356-7). The Olsen machine, delivered some 30 days late (R. 360), was the first Gocorp machine installed (R. 138). It worked so unsatisfactorily during the next 45 days that it was shut down half the time (R. 360-1). As Olsen admitted, Goldcamp "had considerable trouble" (R. 139). Besser Co. continued to try to place its Besser machinery with Goldcamp. The effort is reflected in a sales letter of March 25, 1949 which, without disparaging any competing machine, expressed Besser Co.'s disappointment at losing an old customer (Ex. 135, R. 1349, 368). Goldcamp says, ambiguously, that in one of many conversations a Besser Co. representative commented that Olsen's machine was "undoubtedly infringing possibly" (R. 361). This is merely what Olsen admitted on the stand (R. 319-320). After the Gocorp machine had been tried for 68 days, with Goldcamp constantly losing money, it was removed (R. 378-379). Goldcamp then installed a Besser machine (R. 365) under a lease contract dated July 11, 1948, covering equipment of a value of $53,488 (Ex. 134, R. 1345, 355). Olsen testified that the only reason given by Goldcamp for the return was that "in the light of the trouble he had had with the Gocorp machine, he had decided to send it back" (R. 139). Goldcamp, though a government witness, flatly denied that the conversation about possible infringement had any influence on his decision to remove the unsatisfactory Gocorp machine (R. 378). Olsen had never heard of any other potential customer being approached by a Besser representative with respect to a Gocorp machine (R. 139).

The witness Lloyd owned a Besser machine, and *after* he bought a Warren machine two Besser representatives,

at his plant, commented that the machine "infringed" patents, but that it had been made under a license (R. 548). This was the Darden license, discussed below. Obviously this was no threat: Warren had already bought the machine, and the conversation contradicted infringement by reference to the license under which it was manufactured and sold. Lloyd himself says he did not construe this as a threat, and the colloquy between the court and government counsel at the conclusion of his testimony illuminates the insignificance of the incident (R. 556-560).

The witness Longenecker, owner of a concrete block plant known as Building Units, Inc., had negotiated for years with Besser representatives. He did not suggest that in any conversation through these years, prior to 1950, the question of patents was ever mentioned. In April, 1950, a few weeks before the trial of the antitrust action, Fox of Besser called to collect delinquent rentals on a leased machine (R. 466, 845). During this conference Fox tried to negotiate the placement of a second machine. Longenecker said he was going to buy a Lith-I-Block machine (R. 466-7, 847). Longenecker had learned at an industry convention, months before, about the pending patent litigation against Lith-I-Bar (R. 467). This case had been tried in early 1950 but was undecided at the time of Fox's visit. Longenecker claims Fox told him that the case "was concluded in favor of the Besser" Co. (R. 467). Fox denied that he made the statement, or that the patent case was mentioned (R. 845). If the statement was made, it was premature, and probably resulted from a misconstruction of some remark by the judge during the patent trial. Judge Picard recognized this (R. 579). And, in any event, the trial court did on June 25, 1950 sustain the Gelbman-Andrus infringement claim.

This summarizes all the admissible evidence of contacts between Besser representatives and potential customers. The record is cluttered with statements by witnesses improperly admitted over valid objection to its hearsay character, as to what witnesses had been told by others. The

court offered to recess to allow the Government to take depositions which would obviate the objectionable character of this hearsay (R. 144), but no depositions were taken for this purpose. There were also improperly received in evidence several exhibits, consisting of letters from concrete block makers, purporting to tell stories of what they had heard. The trial court, when the matter first arose, recognized that such hearsay testimony was incompetent (R. 135). Thereafter, the trial judge, when (erroneously) admitting this hearsay testimony, and these hearsay exhibits, observed that he was not "taking this in any way as proof of the fact itself" (R. 136. See also, e.g., R. 141, 168, 418). As the court said, "I have been around long enough to know not to believe everything I hear through hearsay, and this is not the best testimony and doesn't prove it at all" (R. 144). Rather the court "permitted [it] not as proof of the fact that they did it but as proof of what was told to [the witness] by one of [his] customers" (R. 137). Such testimony, clearly inadmissible, should not have been received. Being incompetent, it will not be summarized here.

(iii) Discussion with suppliers.

The trial court found that "Besser brought influence on a material supply source of Darden that curtailed the Warren output since Darden was building the Warren machine" (R. 1023). This finding is clearly erroneous.

This can only refer to Link Belt Co. The Atlanta branch of that company was to make certain machines for Darden. There is no evidence whatsoever that Besser Co. or Besser ever spoke or wrote to Link Belt Co. or any of its personnel.

Olsen, for Stearns, wrote Besser on July 8, 1946, that it had occurred to him that in the event of litigation the home office of Link Belt might decide they would not want to get involved in such (Ex. 54, R. 1261, 814). On July 31, Paulson of Besser Co. passed Olsen's idea along to Gelbman, in connection with the correspondence respecting

the Darden infringement action then in preparation (Ex. 56, R. 1263-4, 814). There is no evidence that Gelbman communicated with Link Belt Co.

Six months later a Darden customer was sued for infringement (see page 29, *infra*). On February 17 and 18, 1947, the manager of the Atlanta branch of the Link Belt Co. went with Darden to Chicago to an industry convention (R. 486). Darden had requested the lawyers handling the infringement case to arrange a meeting at this convention with Gelbman, Olsen and Besser (R. 482). On February 18, Darden, Olsen, Besser, Gelbman and "several other people" met in Olsen's room to discuss Darden's request for an unlimited license, which Olsen refused to permit, Besser concurring (R. 482-3). The Link Belt manager then flew back to Atlanta (R. 486). Darden testified to a conversation by phone with the branch manager on February 20. This was clearly inadmissible as hearsay, was objected to, and should not have been received (R. 486). But if this incompetent evidence be accepted, all the branch manager told Darden was that the president of Link Belt had instructed him not to serve Darden until the pending patent litigation was cleared up (R. 486).

This evidence, even including that which was incompetent, is inconsistent with the finding that Besser influenced Link Belt. The incident occurred nearly seven months after Paulson's letter. The record is consistent only with the conclusion that Link Belt had its Atlanta manager in Chicago with Darden to observe or promote the settlement negotiations, received his report of Darden's broad demands, and decided to take precautions against infringement. This was a normal reaction of any company under the circumstances.

(c) *Litigation.*

To stop the widespread infringement which the defendants, as a result of their investigations, believed was occurring, test actions were instituted.

In January, 1947, Gelbman and Andrus sued a Darden customer (R. 480). Shortly thereafter, Gelbman advised Stearns and Besser Co. that Darden and his lawyer had visited Gelbman in New York to discuss settlement by a license (Exs. 20, 21, R. 1217, 803-4). Olsen for Stearns insisted that the infringement action continue (Ex. 22, R. 1218, 804-5).

Subsequently, meetings were arranged at the Chicago convention (R. 482). On February 20, 1947 a preliminary agreement was made by Darden and Gelbman (Ex. 76, R. 1274, 488-9). This was replaced by the formal license of March 17, 1947 (Ex. 25, R. 1224, 489-490). This recited the desire of the parties to settle the pending litigation and avoid future litigation, licensed Darden under the Gelbman patents to manufacture, use and sell 35 machines, and provided that Darden thereafter "cease and desist from the further making and selling of any machines *embodying the inventions covered by any of the claims" of the patent* (R. 1226). Olsen and Besser approved this settlement (Ex. 77, R. 1276, 489).

There is nothing to impugn the good faith of the patent owners or their attorneys in prosecuting the action to enforce their patents, or in settling it by a license to manufacture 35 machines and thereafter to cease operations which were infringing the patents. Nothing in the agreement barred Darden from developing a business which would not infringe the patents.

Actions also were instituted by Gelbman, Andrus, and Besser Co. against users of the Milewski Lith-I-Block machine. As early as November, 1946, Stearns had reported on the machine to Gelbman (Ex. 84, R. 1280, 811), but Gelbman had suggested that the present efforts be concentrated on the action against Darden (Ex. 85, R. 1281, 814-5). Olsen of Stearns urged on April 14, 1947, after the Darden settlement, that "it would be wise to start suit against some user of one of the other infringing machines," and suggested the Lith-I-Bar Company (Ex. 81, R. 1279,

811). The subsequent decision by the district court sustaining the Gelbman-Andrus claim of patent infringement has been stated *supra*.

(d) *Negotiations.*

Of those who were believed to be infringing the patents, Hanneman and Darden received licenses: Hanneman for 10 machines (Ex. 24, R. 1221, 223), Darden for 35 (Ex. 25, R. 1224, 489-90). At the time of trial, neither licensee had made the number covered by his license (R. 248, 490).

The Appley license mentioned in the opinion (R. 1023-4) did not involve infringement. Appley—who did not testify—had shown the respect for patent rights which is the normal attitude of ethical businessmen (See Appley's letter, Ex. 11, R. 1209, 798-9). Early in 1950 he requested a license for one-at-a-time and two-at-a-time *cored pallet* machines (R. 790-793). These were the only types he manufactured (R. 793). His success is reflected in the fact that in the three years 1946-1948 he produced some 1,750 machines, all of the same hourly capacity (Ex. 184, R. 1396, 999). His company ranks fourth in the industry (Opinion, R. 1014). At Appley's request, Stark visited his plant, and a satisfactory license was negotiated and signed (R. 789). Stark says that the license was approved by Gelbman (R. 791), while Gelbman says he did not authorize it (R. 870-1). In any event, it was signed by Besser Co. and by Besser on behalf of Gelbman and Andrus (Ex. 162, R. 1378, 788). Under the terms of the 1942 license agreement, however, it could not be delivered to Appley until Stearns consented (R. 793), and such consent had not been forthcoming.

The failure of Stearns to agree to this license contract is consistent with the attitude of that company when Olsen was dominant. Olsen's judgment for Stearns was, he concedes, his own independent judgment, uninfluenced by Besser (R. 318). In 1947, as in 1950, the defendant Stearns

blocked Appley's request for a license (Ex. 13, R. 1211, 799-800.)

In 1947 one Lagarde had built and was using in his block business two machines which were believed to infringe the Gelbman-Andrus patents. He, Gelbman and Andrus "desired . . . that any differences between them regarding said possible infringement be settled without resorting to litigation" (Ex. 23, R. 1219, 800). To this end, on March 21, 1947 a release was executed by Gelbman and Andrus licensing Lagarde to continue to use his machines in consideration of his agreement not to make additional machines infringing their patents (Ex. 23, R. 1219, 800).

On April 1, 1947 Besser Co. made a contract with Lagarde. It recited that Lagarde had built and was using certain machines on which he had filed patent applications, that Besser Co. had certain patents which might be infringed by such machines, and it was the desire of the parties to settle any difference between them without litigation (Ex. 92, R. 1286, 815).

Besser granted Lagarde a royalty-free, non-exclusive license under its present and future patents. Lagarde granted Besser an exclusive license under his pending applications, at $100 per machine employing such patents, terminable if royalties failed to reach an annual minimum of $600 beginning six months after issuance of the patent. Besser Co. was granted a privilege of access to Lagarde's plant to observe any new developments, for which it was to pay $50 monthly the first three years, with the privilege continuing thereafter without cost so long as Besser Co. paid the minimum royalties on Lagarde's patent. If new developments were deemed patentable, Besser Co. could pay the expense of patents; but if it elected not to do so, Lagarde could patent, in which event Besser Co. would have the first option to purchase or license under them "on mutually agreeable terms." If Lagarde conceived ideas which were too large for him to develop, Besser Co. might at

its option undertake such development for the mutual benefit of the parties.

Lagarde did not testify, and we have no evidence about the circumstances of this transaction. It is clear from the agreement that Lagarde, like Randolph, was not a manufacturer of machines; he made blocks, and for his own use built two machines. Besser Co. did not make blocks, and Lagarde did not manufacture machines for sale. How the arrangement, whereby Lagarde secured a market for his patent, affected competition is not explained by anything in the record.

Discussions looking to the possible license of Olsen and Milewski were unproductive. Olsen, after organizing his new corporation in 1948, approached Gelbman for a license (R. 117). Since Olsen had been Gelbman's exclusive licensee until 1942, had been one of the two exclusive licensees from 1942 to 1948, had consistently refused to agree to licenses to others, and had been most aggressive in supporting Gelbman's efforts to stop infringements, it was not surprising that Gelbman's reply was that Olsen, in view of the Stearns policy which he had himself established, "ought to know what would happen" (R. 118). Nevertheless, discussions continued. Early in 1950, shortly after the trial of the patent action against Milewski, and while it was under advisement (R. 29, 401), Olsen invited Milewski to meet with him and Besser to discuss licenses to both companies (R. 122). Olsen says that he did this at Besser's "request" (R. 123), which seems somewhat doubtful in view of Milewski's testimony that at the resulting conference Besser stated that his company had no proposition to make but was glad to confer and to receive any suggestions (R. 434). The reasonable inference is that the conference was to explore the possibility of settling all disputes arising from the Milewski litigation and the probable infringement admitted by Olsen on the stand.

Besser was prepared to consent to an unrestricted license to Olsen and a license to Milewski permitting use

of the patents on one-at-a-time and two-at-a-time machines (R. 122-3, 399-406). Besser asserted that it was "positively not" his intent to eliminate a competitor manufacturing three-at-a-time machines, and that the only thing his proposal contemplated was that the Milewski three-at-a-time machines not be so constructed as to infringe (R. 987). He said:

> "The only thing in connection with the three-at-a-time was that they would not use the latest patented developments of the Besser Co., which would soon be their property anyway, as the patents ran out in a few years" (R. 988).

Milewski was unwilling to accept the license (R. 123, 407-8), and the discussions ended.

I. Purchase of Flam assets in 1946.

On November 21, 1946, Besser Co. purchased certain patents owned by Stephen Flam and certain assets owned by Stephen Flam, Inc.

Except for the agreements, there is virtually no evidence about Flam or about the company which bore his name. Flam, Inc. manufactured small vibrating units (R. 48).

Flam individually, for $80,000, sold to Besser Co. four patents issued in 1930-1943, and the rights under two pending and one immediately forthcoming patent application (Ex. 26, R. 1229, 814). Flam was employed for five years in a consulting capacity for not over three months of each year. For his services, Flam was to be paid $6,000 per year, terminating in the event of his death. Any inventions made by him during his employment relating to concrete block, tile and brick making machines and concrete mixers were within the grant. Ancillary to the sale and employment, Flam covenanted that for eight years from January 1, 1947, he would not engage or be employed, or permit his name to be used, in any business or enterprise for the manufacture of apparatus or machinery for making concrete

blocks, tile, brick or other wall building units, or concrete mixers, except in connection with Besser Co.

Stephen Flam, Inc., for a consideration of $75,000, executed to Besser Co. a conditional sales agreement covering an extensive inventory of personal property in California (Ex. 27, R. 1235, 805; inventory R. 1242-1246).

Besser Co. also purchased the finished goods, work in process, and raw materials of Stephen Flam, Inc. (Ex. 28, R. 1238, 805). The amount payable was fixed by physical inventory, plus $20,000 for services in purchasing, handling, storage, and caring for the items prior to delivery of possession in June 1947. This contract recited that for some years Flam, Inc. had been selling in California machines for making concrete blocks, etc.; that it was selling its good will; and that it would not carry on such business in California while the purchaser, or one deriving title to the good will from it, carried on the business. Provisions were made for orders received during the closing period, and for the continuance of the sellers' sales and other employees with the buyer.

Finally, Flam, Inc. sold Besser Co. certain real estate in California for a consideration of $80,000 (Ex. 29, R. 1246, 805).

J. Purchase of stock of Stearns Co.

During 1946 Besser purchased 13,765 shares of the common stock of Stearns Co., which was recorded in the names of nominees (R. 590-2). On March 26, 1948, Besser Co. acquired 61,325 shares from Olsen and his family for a total consideration of $813,750 (R. 599-600; Ex. 36, R. 1253, 806). Additional stock was acquired from others by Besser Co., making its total holdings between 85,000 and 89,000 shares (R. 16, 931). Stearns has outstanding approximately 189,000 shares (R. 928).

These purchases were negotiated by Pierce E. Wright of Detroit (R. 586), who became and was at the time of the trial a vice-president and director of Stearns. Wright's

testimony as a government witness reflects his hostility toward Besser. Yet Wright testified:

> "Q. Now beginning on May 4, 1948, can you state whether or not Mr. Besser participated in the management of the Stearns Manufacturing Company in any way?
>
> A. He did not.
>
> Q. So that beginning on that day to your knowledge, Mr. Hultmark and the other officers of the company are the ones who ran the Stearns Manufacturing Company?
>
> A. Yes, sir.
>
> . . .
>
> Q. Did Mr. Besser make any comments to you about your management of the company?
>
> A. None whatever.
>
> . . .
>
> Q. Did Mr. Besser ever make any comments to you on the management of the Stearns Manufacturing Company following your election as vice president?
>
> A. No, none specifically." (R. 605)

Besser likewise testified positively that since the purchase of the Stearns stock he had not participated in or otherwise influenced the management of Stearns, which had continued to manufacture the machines it had made prior to the purchase and had added new models (R. 930-1). During this period, the companies had no common agents or representatives (R. 930).

Wright testified that Besser instructed him that Olsen, in selling his stock, should agree to stay out of business for five years (R. 597). Wright admitted, however, that before the purchase he reported to Besser that Olsen was not going to agree to this, and Besser told him to proceed (R. 598). Wright's testimony was flatly contradicted by Olsen, who, on direct examination by the government, not only stated that he had told Wright at the closing there was no such agreement (R. 109), but directly to the contrary: *"I had told the representative of the purchaser of my stock before he bought it, that I did intend to start again"* (R.

115). Olsen repeated later in the trial his positive denial of any such agreement (R. 849). Besser corroborated the fact that there were no "strings of any nature" on the purchase (R. 931). Nineteen days after Olsen received over $800,000 for his stock, and while he was still drawing his salary as Stearns' president, he announced to a gathering of important potential customers his intention to form a new company (R. 115). On June 1, 1948, which was 27 days after he retired as president of Stearns, Olsen incorporated his new company (R. 602-4, 110).

Early in 1950 one Ben Stone became interested in purchasing Besser's stock in Stearns. Stone was engaged in buying and operating manufacturing and other businesses, making his gain from increased profits obtained by improved operations under his supervision (R. 657). Stone planned to expand the Stearns operation into an additional line of aglite or sintering equipment, for which he would need added factory space (R. 670). Both the Stearns plant and Olsen's company are in Adrian, Michigan, and the Olsen properties would be adequate to supply the added space (R. 673). On March 30, 1950 Stone contracted to buy 25,000 shares of the Stearns stock owned by Besser Co., with an option to buy and a proxy to vote the balance (Exs. 159, 160, R. 1374, 1377, 658, 662). In these negotiations Stone was represented by his own attorney (R. 937), and there was no arrangement or agreement between Besser Co. and Stone other than as expressed in the contract (R. 938). Olsen was interested in the possibilities of working out a deal, as shown by his conferences with Stone and his trips with him to inspect an Ohio plant (R. 125, 328, 333). The purchase of Olsen's facilities by Stone was in no sense a condition to the Besser sale (R. 674, 944), and it was made clear to Olsen that there was no suggestion that he discontinue his block manufacture (R. 125).

The judgment ordered Besser Co. and Besser within 60 days to present to the court for approval a plan for divesting themselves *by July 1, 1951* of all stock holdings in Stearns, and ordered cancellation of any and all contracts

or agreements in existence relating to the disposition of such stock (R. 1064). This, of course, struck down the proposed sale to Stone, and the Stone contract has been cancelled.

K. Other negotiations.

In December 1948, Bernard Flam of California (apparently the son of Stephen Flam) had two patent applications, one of which had been filed. At that time Bernard Flam granted Besser Co. an exclusive license under patents issued on the applications, with a first option to acquire exclusive licenses under any inventions within a defined field made by Bernard Flam during the term of the agreement (Ex. 99, R. 1296, 816). The consideration was $65,000, of which $62,000 was payable $1,000 monthly. During such payment period and for five years thereafter Bernard Flam agreed not to "engage in, be connected with, or be employed, or permit his name to be used . . . in any business or enterprise for the manufacture of apparatus, equipment, or machinery for making concrete block, structural tile, brick, or other wall building units or concrete mixers (saving and excepting so-called portable 'transit' mixers, and roof covering tile) except in connection with any consultant services which" might be rendered to Besser Co.; and also agreed to change the name of his company so as not to include the name "Flam."

There is no evidence with respect to Bernard Flam other than the contract.

There is some evidence that Besser Co. representatives suggested to Olsen and Milewski the possibility of Besser Co. buying their companies and employing them. Besser denied having negotiated to buy Gocorp (R. 945). In any event, both men replied that they were not interested (R. 131-3, 390-3). Warren, who was not a block machine manufacturer but had made three machines for his own use, also testified to a vague suggestion that he might work with Besser Co. at his own plant. He also was not interested (R. 533-5).

L. Leases of Besser machines.

In 1947 Besser Co. was developing a new technique for more efficient operation of its machines. Without detail, this may be described as a method whereby pallets to receive the blocks were fed empty into and discharged loaded from the front of the machine, instead of being fed in at the back or side and discharged at the front (R. 948). The process necessitated a different frame and different style of handling the blocks, and permitted higher speed operation with production increased by approximately 25% (R. 754; production figures from Ex. 186, R. 1400, 1002). A more advanced machine was designed, known as the Super Vibrapac front pallet or "return-feed pallet" (R. 948-9). This would make simultaneously one, two, or three blocks. The most popular size was the three-block machine (R. 947, illustrated Ex. 180, R. 1389, 892), with an hourly capacity of 750 blocks.

In October, 1947 the company announced a revised distribution policy under which other models would be sold, but its front-feed machines would be distributed exclusively on lease (R. 752, 945. See also Ex. 100, R. 1300, 816-7). The rear-feed Super Vibrapac, three-block size, sold at from $25,000 to $28,000 (R. 751). There was no retail price for front-feed machines available only on lease, but Besser Co.'s investment in such machines when installed was in excess of $30,000, with a continuing service obligation running for the period of the lease (R. 953-4). A minimum figure to pay their cost plus a "fair" profit would have been $40,000 (R. 755).

A lease form is shown in blank in Exhibit 101 (R. 1303, 813); and executed in Exhibits 134 (R. 1345, 355), 136 (R. 1351, 380), and 152 (R. 1365, 564). The leases are for five years, with the lessee having an option to renew for an additional five years, the rental being fixed at 1¢ a block, with a monthly minimum, and with an advance rental deposit, a portion of which is credited against each month's accrued rental. These customer deposits, on 70 machines

having a capital value of over $1,500,000, amounted on December 31, 1948 to $78,949.67 (Ex. 40, R. 1256, 806)—an average of slightly over 5% of capital value. This rental entitled the lessee to have the guidance, after installation, of an expert to instruct the lessee in operation (R. 952); and the services of a staff of engineers who periodically visit the lessee's plant to make recommendations for more efficient operations (R. 953). A lessee is not required to buy any supplemental equipment from Besser Co. (R. 951). He may buy such items from any supplier, though of course Besser Co. is prepared to sell them if the lessee desires (R. 952).

The following table reflects Besser Co. operations for the three years 1946-8 (from Ex. 1, 1179, 100 and Ex. 186, R. 1400, 1002).

		Machines for Sale (rear-pallet feed)		*Machines for Lease (front-pallet feed)*	
	Hourly Capacity	*Produced*	*Sold*	*Produced*	*Leased*
1946	600	170	184	—	
	250	16		—	
	Total	186	184		
1947	750	—	—	5	
	600	186	208	—	7
	250	21		3	
	Total	207	208	8	7
1948	750	—	—	56	
	600	19	16		63
	250	2		12	
	Total	21	16	68	63
Total 1946-8		414	408	76	70

Longenecker testified that in October, 1946, during development of the front-pallet feed, he made two contracts with Besser Co., one for a Besser Vibrapac without return pallet and one for the pallet return and changeover (R. 561-2; Exs. 148, 149, R. 1360, 1362, 562). A deposit of $3500 was made (R. 451, 563; Exs. 150, 151, R. 1363, 1364, 563). Prior to delivery, the policy of distributing on lease was introduced. In October 1947, Besser Co. advised Longenecker of this policy and declined to sell, but offered to lease the front-pallet machine (R. 452-4). Longenecker's attorney advised him that he could seek specific performance; purchase another machine and sue for damages; or negotiate a lease (R. 454-6). Machines made by other manufacturers were then available. This was about the time Miller was in the market, a "lot of people" were trying to sell him a machine, and he bought a Lith-I-Block because he elected not to lease a Besser machine (R. 50-52).

Being fully advised by his counsel, Longenecker elected to lease (R. 455, 570). The lease was executed October 21, 1947 with Longenecker's attorney as witness (R. 570; Ex. 152, R. 1365, 564). The Besser representative agreed that if machines of this type were later offered for sale, Longenecker would have the privilege of buying the leased equipment; and that if any other customer received a lease on more favorable terms Longenecker would be granted the same (Ex. 153, R. 1369, 565).

In December 1947, the machine was delivered, but due to delays in development the front-pallet feed was not attached (R. 456). Subsequently, Longenecker leased two other machines (R. 569). In May, 1949, a new machine was installed, including the front-pallet feed (R. 457). Shortly thereafter Besser Co. confirmed its policy of leasing rather than selling these machines (R. 462-4, Ex. 155, R. 1371, 567). Longenecker claims that in October, 1949, the Besser representative, offered to sell him the leased machine for $60,000, which he thought was too high (R. 465).

The lease plan is attacked by the government in one short paragraph which alleges that it was "for the purpose of retaining control over used concrete block machines and preventing the marketing of such used machines in competition with new concrete block machines manufactured by Besser Co." (R. 9).

There is no evidence to support this allegation. When Besser was called by the government, he was not asked a question with respect to used machines (R. 728-761). Longenecker made no reference to used machines. No witness testified that he had ever bought or sold, or ever had any interest in buying, selling, or negotiating for a used machine. In fact, used concrete block machinery is nowhere mentioned in the record.

At the first argument upon the form of the final decree, eight months after the government concluded its case (R. 991, 1011), the government returned to the subject of leases. Without any reservation of a right to offer evidence relating to the decree, without prior notice, without securing leave to reopen the evidence, and over objections of the defendants (R. 1041, 1048), the government called three witnesses. One was a lessee of a Besser machine, whom the government first approached some 30 days after the opinion (R. 1044-5), who testified that "if the price was reasonable" he would like to buy his leased machine (R. 1043). Two were manufacturers, Olsen and Milewski, who had previously testified, who between them had on hand sufficient materials to manufacture some 35 machines of the capacity the first witness was using (R. 1049, 1052). Neither testified that additional materials were unavailable, though they stated that supplies were "slowing up" (R. 1050) or "difficult" (R, 1053).

A second argument on the form of judgment was held April 3, 1951. The government on March 26th had filed its amended proposal (R. 1056) which in Section VIII would have required that the defendant Besser Co. sell to any

lessee electing to purchase, any, some, or all of the concrete block making machinery and accessories on lease (R. 1061). Counsel for the defendant proposed to argue the factual and legal reasons why such relief should not be granted. He was stopped by the court with the following statement:

> "And I don't see any great reason why you should discuss that further. If I switch, I certainly would give you the opportunity to be heard. But right now I don't feel that I am going to compel them to sell. I think I might destroy competition by it, because it discourages the other fellow from going into the business" (Record, original p. 2465, omitted in printing).

Relying upon this ruling from the bench counsel for the defendant did not discuss the subject of compulsory sale of the leased machines. No further opportunity for argument was afforded to the defendants. Nevertheless, in the judgment as finally entered, the trial court, despite the absence of any proof tending to reflect upon the propriety of the leasing program, directed Besser Co. within 30 days to notify every lessee of one of its machines that the lessee at his option might (1) terminate the lease at any time prior to January 1, 1953, or (2) continue under the lease, or (3) "enter into an agreement to purchase the machine or machines leased, and the accessory equipment used, as mutually satisfactory to the parties concerned; provided . . . that the provisions of sub-sections 1 and 2 . . . shall be contingent upon said lessee making his election in writing on or before October 1, 1952" (R. 1068). The provisions of subparagraph 3 were subject to a later comment by the trial judge:

> "Are you assured now that the judgment provides that there is no compulsory method outlined in the judgment, or any compulsion in the judgment itself, that you have got to sell or lease to anyone?" (R. 1084-5).

M. Post-decree proceedings.

After directing that Gelbman, Andrus, Besser Co. and Besser (but not Stearns) grant to any applicant licenses under all patents now owned or controlled by them, "or which are issued or applied for within ten years" from the judgment, the trial court conceived an unprecedented procedure for fixing a "fair royalty price for the use of the various patents, present and future, . . . and the form and contents of the royalty contracts". He provided that the government should appoint two persons and Besser Co. and Besser two persons to act as a "committee" to determine royalty rates and the form of the licenses. If they were unable to agree, the four should select a fifth member. If they could not agree on a fifth member, the court would have the right to act as a fifth member or appoint one. The prices and form of agreement determined by the committee should be filed with the clerk "and upon so filing will then become a part of this judgment" (R. 1066-7).

Appellants contend that these provisions, and the proceedings under them, unlawfully attempted to delegate judicial functions to laymen, and deprived these appellants of the fundamental guarantees of due process.

On April 23, 1951, the government designated, as its representatives, Darden and Olsen (R. 1070). The government confessed that it had no knowledge of the value of the patents, and asserted that "the holders of the patents . . . and the prospective licensees are better equipped to work out, through private negotiation, a form of license and the rates of royalties" (R. 1070-71). The government repudiated any obligation "to direct, guide and control the actions and decisions of Messrs. Darden and Olsen" (R. 1071).

Thus the government renounced any responsibility for fairness either in the "committee" activities or its report, while naming as its representatives two of its witnesses, both competitors of Besser Co., both—as the designation states—"prospective licensees and designees of other

prospective licensees" (R. 1071), both having direct and adverse pecuniary interests in the issues to be "worked out"—to use the government's language—"through private negotiations" (R. 1071).

Besser Co. and Besser consistently objected to these judgment provisions. On May 8, 1951, they applied for a stay pending perfection of appeal (R. 1080). An inquiry by the district judge casts light on his concept of the procedure:

> "May I ask if the defendant Besser has now appointed the *arbitrators* or the *members of the committee* that are *suggested* in Paragraph VII(B)" (R. 1080, italics added).

The court was advised that the appellants would contend on appeal that the provisions for a "committee" were erroneous, and that they would be in a contradictory position if they complied in the interim (R. 1080).

In the ensuing colloquy, in the course of which the judge castigated defense counsel (see R. 1082, third paragraph; R. 1083, first paragraph), the court referred again to the "two *arbitrators*" who were to be appointed (R. 1081). The judge could see "no excuse why the Besser people did not at that time appoint two *arbitrators*" (R. 1082). Yet he conceded the possibility of prejudice, and directed that compliance should "not prejudice your case one bit" (R. 1082). The court then declined the stay, intimating that after the committee acted he would be "inclined" to grant a stay (R. 1084, 1085).[5]

Directing that the committee meet, the court commented:

> "If they can't finally get together, the Court will act, and my knowledge of the concrete building block machines, or the patents, has increased 1000 per cent in the last year. I will be able to make a good selection." (R. 1084)

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[5] Subsequently it was necessary for defendants Besser Co. and Besser, in order to be protected pending appeal, to secure a stay from Mr. Justice Reed of this Court (R. 1176).

Reserving their objections, appellants on May 9, 1951, appointed Marx Rosenthaler and John Stark their representatives (R. 1086).

The "committee" met in Detroit May 21, 1951. Rosenthaler and Stark appeared alone; Darden brought along one Vernon H. Doane, an attorney of Washington, D. C.; and Olsen brought E. J. Balluff, an attorney of Detroit (R. 1119, 1126). In the ensuing discussion, the attorneys representing Olsen and Darden offered $25 per "opening" per machine for both the Scott and Wellnitz patents, i.e., $75 on a three-at-a-time machine (R. 1120, 1127). Rosenthaler and Stark, pointing to the heavy investments in the patents, asserted that a fair royalty for the Wellnitz patent was $600 per machine, for the Scott patent, $100 per "opening", and for the Besser patent, $25 per "opening" (R. 1120, 1127). Being unable to agree, the "committee" adjourned.

The "committee" met again May 22, 1951, at 9:15 A. M., with the same persons present. Rosenthaler and Stark swear that the lawyers for Darden and Olsen "stated that since Besser Co. had been found guilty of anti-trust violations it could expect nothing other than a nominal royalty and that the cost of Besser's investment in the patents and in experimental work and the relative differences in dollar value between the 1938 and 1951 situations had nothing to do with fixing a royalty rate" (R. 1120, 1128). Neither Darden nor Olsen in their affidavits dispute this account (R. 1142, 1145). In an unsworn statement, Olsen admitted that substantially this statement was made by Darden, but that Olsen disagreed (R. 1093). Rosenthaler replied that "it was not his understanding that . . . the judgment . . . contemplated any such penalty. It was his understanding that . . . the so-called royalty committee was to arrive at fair patent royalty rates" (R. 1120-21, 1128).

The government representatives then announced that there was no need of further discussion: they were going to see Judge Picard. No effort was made to agree on a fifth "arbitrator." Rosenthaler informed the government

representatives that the Michigan attorneys for Besser Co. and Besser were on that day in New York and requested that they not approach the judge until counsel for both parties could draw up a report. The government representatives said they were not interested in such a report, and the "committee" adjourned (R. 1121, 1128).

Later that morning Olsen telephoned Rosenthaler and stated that he had talked to Judge Picard on the phone and Judge Picard had sent word that he would make himself the fifth member of the committee and the committee would meet at 9 o'clock on May 23 "and that the committee would then fix the royalty rates whether or not the Besser representatives on the committee were present. Mr. Olsen further said that Judge Picard had stated that whether or not the attorneys for Besser Co. and Besser were available did not make any difference to him" (R. 1121-22). This is not disputed by Olsen (R. 1142-4).

On the same day, John W. Babcock and Carl R. Henry, Michigan counsel for the Besser defendants, sent a telegram to Judge Picard. This telegram (quoted in full, R. 1122-23), informed Judge Picard that counsel were in New York to expedite the appeal, reviewed counsel's information as to the proceedings of the "committee," explained that counsel could not return in time for the session the following morning, and concluded:

> "In view of these facts we respectfully except to any informal proceedings at the conference on May 23rd, and except to any formal action during that conference. We also respectfully except to any procedure then or thereafter, either by the court or the committee, which purports to set royalty rates or terms without affording to our clients a full opportunity to present evidence to the full committee of five, to be heard by such committee, and to have a formal record of all future proceedings with respect to this matter." (R. 1123)

On the morning of May 23, Judge Picard, Olsen, Darden and Rosenthaler met. Stark had left Detroit before Olsen

advised Rosenthaler of the meeting (R. 1089, 1121, 1128), and Rosenthaler had been unable to contact him to return (R. 1089). Judge Picard designated himself as fifth member of the committee (R. 1090).

With all respect, appellants submit that this was the last act of Judge Picard in connection with his "arbitration committee" which, under the most liberal interpretation, could be viewed as a judicial act. Having made himself a part of the "arbitration" machinery which he had imposed on defendants over their protest, with the decision of his "committee" to be determined by majority vote, he abandoned his judicial role. It would not be inappropriate for appellants hereafter to refer to Judge Picard without judicial title. Such a reference, however, might suggest a discourtesy which would not be intended. We shall, therefore, continue to use the judicial title, but with the clear caveat that none of his subsequent acts in connection with his "committee" constituted the performance of judicial functions.

Olsen then told Judge Picard that it was the view of Olsen and Darden that the rate per opening per patent, on the Scott, the Wellnitz and the Besser patents, should be $25 (R. 1090). Rosenthaler told Judge Picard that he and Stark were the opinion that Wellnitz (which had no relation to the mold) should be $450 per machine, Scott $75 per opening, and Besser $25 per opening (R. 1090). Rosenthaler then asked Judge Picard for an opportunity to submit formal evidence (R. 1091) and handed Judge Picard a copy of counsel's telegram containing the same request (R. 1091-92). Judge Picard's reply was: "How long will it take you to prepare that? I am ready to decide this question today some time" (R. 1091).

Judge Picard asked Olsen and Darden if their figures were a "fair" royalty, and they replied in the affirmative (R. 1093). If Judge Picard had the knowledge to evaluate a given figure as a "fair" royalty, this question was superfluous. If he did not, his subsequent vote was an uninformed

vote, deliberately so since he refused the defendants an opportunity to present evidence. It is appropriate, therefore, to consider the qualification of Judge Picard (in his non-judicial capacity as an "arbitrator") to determine a "fair" royalty for these patents. Three were involved:

A. *The Wellnitz patent*, on which the government representatives argued for $25 an opening, or $75 for a three-opening machine, and the Besser representatives urged $450 per machine.

Judge Picard had never heard of the Wellnitz patent prior to the trial (R. 941). When it was mentioned during the trial, he stated he did not want to get interested in it and would not look at it (R. 943). It was vaguely described, in answer to a later question of the judge, as an electrical control to set automatically the height of the block, a "little bit" like an electric eye (R. 990). There was no evidence in the record as to any facts pertinent to this patent. In the meeting of the committee, Judge Picard confessed his desire "to learn more about the Wellnitz patent" (R. 1094). In undertaking to vote on a royalty for this patent, Judge Picard could not have been relying on any knowledge acquired as a judge in either this case or the earlier patent case.

B. *The Scott patent.* This patent was mentioned repeatedly during the trial and was also involved in the prior patent infringement suit tried before Judge Picard. There was, however, no evidence here as to its value, and there is nothing in this record to hint that the question of value had been developed in the patent cases, which sought injunctive relief. In undertaking to vote on the license fee for this patent, Judge Picard as "arbitrator" could not have been relying on any information obtained by him as a judge.

C. *The Besser patent.* Judge Picard apparently knew nothing about this patent, but since the government and the Besser representatives were in agreement on the rates for it, his lack of information was immaterial.

At the morning meeting of May 23, 1951, Judge Picard criticized the presence of counsel for Olsen and Darden (R. 1092, 1093-94). He then adjourned his "committee" until 2 P.M. His attitude toward the request for a formal hearing was clear:

> "What I want to hear is a little bit more evidence as to why you think it should be $450 and why you think it should be $25, $25 is enough.
>
> Mr. Rosenthaler: I haven't Mr. Stark or anybody here.
>
> The Court: I don't care about that. You know what your arguments were.
>
> Mr. Rosenthaler: I can give them to you as a general basis.
>
> The Court: All right. Then I want the general basis, and I don't want counsel here. I don't want to hear it." (R. 1095)

Olsen, Darden and Rosenthaler met during the recess. Rosenthaler again asked an opportunity to submit proofs and accounting records relevant to the royalties (R. 1124). Olsen and Darden declined to agree (R. 1124, 1143). Olsen and Darden admitted that they could negotiate fair royalties with Besser (R. 1124, 1143), but refused to meet with Besser (R. 1124). Rosenthaler states that they gave as reasons for declining that they had to consider both the industry and their private instructions from the Department of Justice to insist on a low royalty (R. 1124). Olsen excuses the refusal to talk to Besser on the ground that while he and Darden could have agreed on royalties fair to their own companies, they were obliged to reach terms "which would be equitable and fair to any applicant," and that the committee procedure should be followed (R. 1144). Darden is silent (R. 1146). Both Darden and Olsen deny that they stated they had private instructions from the Department of Justice (R. 1144, 1146).

The "committee" met again on May 23, 1951 at 2:30 P.M., with Judge Picard, Olsen, Darden and Rosenthaler present. Rosenthaler immediately requested "an opportunity of bringing in the final [i.e., formal] evidence and

proof of the factual statement that I will make, to the best of my knowledge" (R. 1098). Rosenthaler pointed out that Besser Co. had paid $75,000 cash for the Wellnitz patent and a Meeker application, to which had been added some $200,000 of development costs. This purchase had been made early in 1950, with about 8 years to run, and the maximum number of machines likely to use it would be 150-200 per year. On a machine costing $36,000, the projected royalty of $450, necessary to recoup the investment, would be nominal (R. 1098-1100).

Olsen did not know what Besser Co. had paid for the Wellnitz patent, but conceded that his hearsay information was that at least $31,000 had been paid for the Meeker application (R. 1101). There was then further discussion of the patent and application (R. 1101). Olsen thought that if the Wellnitz patent was available "*at the nominal figures which I think are equitable*" perhaps 1,000 machines a year would use it (R. 1103). Since Olsen previously had testified under oath that he had made only 30 machines in 1949-50, and that he would not make any promises as to future deliveries due to "difficulties" in obtaining materials (R. 1053-4), Judge Picard doubted this estimate (R. 1103). Olsen then suggested that possibly existing machines might be equipped with the device (R. 1104).

No summary could portray the confusion of this discussion of the Wellnitz patent and the Meeker application. No copy of the patent or the application was before the committee. It is reasonably clear that they are interrelated. It is also clear that the Wellnitz patent is in the developmental stage. Rosenthaler, not an engineer, doubted that the Wellnitz patent and the Meeker application could be separated (R. 1099, 1106); Olsen was positive they could (R. 1102); and it is obvious that Judge Picard did not know (R. 1099-1107). Having elsewhere confessed he knew little about the Wellnitz patent (R. 941-43), Judge Picard here conceded he knew nothing about the Meeker application (R. 1109). Darden had nothing to add. As he said, "Mr. Olsen speaks for me" (R. 1108). At the conclusion, Judge

Picard cast his vote for the figures as urged by Olsen and Darden, saying:

> "I will tell you what I am going to do. I am going to accept the recommendation of you two gentlemen, and the main reason for that is that I think they could have had the information, if they wanted to, if they wanted to present it in proper form, that right from the beginning of this—not from the beginning, but especially from the rendition of judgment, there has been a surprising lack of cooperation between the defendants, their counsel and this Court, so that to me, to the Court, it appears as though it is but another attempt to delay matters and not get the judgment complete." (R. 1109)

On May 29th a proposed form of license contract, containing the royalty rates, was filed as the report of the "committee" (R. 1112).

The Besser representatives tried to file a minority report. The Department of Justice refused even to receive a copy (R. 1118, 1129). The clerk refused to accept it for filing (R. 1118), acting on oral instructions from the judge (R. 1131, 1132, 1136). Thereafter a formal motion was pressed (R. 1117), heard (R. 1133) and granted with the comment that it fairly showed what happened (R. 1134, 1135). The minority report finally was filed. The position of appellants is thus stated therein:

> "9. It was and is the view of the affiants that the royalty rates set by the majority of the 'Royalty Committee,' to-wit, Frank A. Picard, Eugene F. Olsen and Roy W. Darden were and are so inadequate as to be confiscatory. It was and is the opinion of affiants that fair royalty rates could be determined only after giving due consideration to the items of original cost and development expense of each patent, and the reasonably foreseeable number of machines likely to be manufactured or operated under such license. It was and is the view of the affiants that the royalties set by the majority of the Committee are not fair royalties. The affiants therefore dissent from the decision of the majority and

without prejudice to the rights of Besser Company, Besser on appeal, present this as their dissenting report." (R. 1125)

In ruling on the application for leave to file the minority report, the court again made clear his conception of the procedure when he referred to his action in preventing Olsen and Darden's attorneys from continuing "as part of the arbitration board" (R. 1134).

ARGUMENT

Summary of Argument

Briefly outlined, appellant will argue that the trial court committed clear error in finding that Besser Co. and Besser monopolized interstate commerce in concrete block-making machinery; that the 1942 patent license agreement was illegal and constituted a combination and conspiracy in restraint of trade and an attempt to monopolize; and that appellants' efforts to enforce their patent rights were also part of an illegal combination and conspiracy and an attempt to monopolize.

In addition, they will show that certain other findings of fact, such as those involving the Flam purchases, are clearly erroneous and cannot support a finding that appellants monopolized or were a part of a combination or conspiracy in restraint of trade or were engaged in an attempt to monopolize. Appellants will concede, however, that there are certain findings of fact which have sufficient support in the evidence to escape a showing that they are clearly erroneous. Appellants will show that such findings do not support a conclusion of monopolization or of combination and conspiracy. The most that these latter findings will support is a finding of an attempt to monopolize.

In any event, but particularly in view of these conclusions, appellants will show that the judgment of the trial

court is punitive, discriminatory, and inappropriate in its provisions for the cancellation of appellants' legitimate leasing system; the compulsory licensing of all its present patents and those acquired or applied for in the next ten years; and in other respects. Finally, appellants will demonstrate that they were deprived of due process of law by the novel provision designed by the district court for getting compulsory royalties and license terms by a non-judicial "committee" of "arbitrators" of which he was a member and by making the report of such "committee" a part of the final judgment without any possibility of judicial review of its determinations.

POINT I

The finding of fact that Besser Co. and Besser have monopolized interstate commerce is clearly erroneous.

In finding that Besser Co. and Besser monopolized interstate trade in violation of Section 2 of the Sherman Act (R. 1029), the trial court employed the so-called percentage base. Prime emphasis was placed on the proportion of the total industry production represented by the *dollar value* of machines manufactured by Besser Co. and Stearns, and their proportion of the total *dollar value* of vibrating machines (R. 1011-16). No effort was made to consider the significance of technological skill, patent rights, or any other factor as accounting for the position of Besser Co.

Mere percentage figures do not—indeed, they can not—determine the legality of a company's position in an industry. Preeminence may result from a complex of factors, none a violation of the Sherman Act. Among such factors, typical ones are that the company was first to enter the industry; that by its inventive and research efforts it has introduced superior techniques, frequently involving important patents; that it has improved its product while

others exercised less initiative; that it has evolved distinct distribution policies which better serve its trade.

All those factors are shown in this record. Besser Co. was the pioneer. By its technological contribution, it has kept its products in the forefront of the industry. One of the most important advances in this type of machinery was Besser's invention of the plain pallet, covered by patent from 1929 to 1946. The superiority of the plain pallet machine is undisputed, and during the period of its patent protection Besser Co. had a lawful monopoly in the production of such machines. Until the 1930's, block making machines produced one block at a time. In the late 1930's Besser Co. began to make a three-block machine. In 1947, the mid-year of the three covered by the statistics, Besser Co. introduced its front-pallet model which increased production by 25%. At the same time, it devised its lease system of distribution, which made this most efficient model widely available to the trade.

Obviously, when a company conceives and engineers a new and more productive machine, and attention is artificially focused upon the commerce in machines of that productive capacity, the company—even without patent protection—has a temporary 100% position until its competitors copy its model or design an equally effective substitute. When Besser Co. introduced its three-at-a-time block machine as a new development in the years before the trial, naturally Besser Co. had an important position in that segment of the trade. But it has not yet been held unlawful for a company to introduce better products, even though temporarily the new development may give its creator a predominant position in the portion of the market it supplies.

Accordingly, it has been held repeatedly that percentage analyses, without more, are insufficient to establish an unlawful monopoly under the Sherman Act. In *United States* v. *International Harvester Co.*, 274 U. S. 693 at 708

(1927), where the defendant controlled some 60% of the market, this Court said:

> "The law . . . does not make the mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its powers."

See also:

> *United States* v. *U. S. Steel Corp.*, 251 U. S. 417 at 451 (1920).

In *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 at 424 (2nd Cir., 1945), Judge Learned Hand, while holding that control over 90% of the aluminum production was enough, in the context of that case, to constitute monopoly, added "it is doubtful whether 60 or 64% would be enough; and certainly 33% is not."

In the recent case of *United States* v. *Columbia Steel Co.*, 334 U. S. 495 at 527 (1948) this Court reiterated its previous position:

> "In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market."

When United States Steel sought to purchase the Geneva Steel plant, the Attorney General of the United States approved the purchase in spite of the fact that the corporation admitted that it would then control 51% of ingot capacity on the west coast (see *United States* v. *Columbia Steel Co.*, *supra*, at p. 506).

Thus the percentage of production or dollar volume is not in itself the key to the issue of monopolization. The

ultimate test is whether there is added an unlawful power to exclude competition when it is desired to do so, and a purpose and intent to exercise such power.

American Tobacco Co. v. *United States*, 328 U. S. 781 (1946);
United States v. *Paramount Pictures*, 334 U. S. 131 (1948).

Without such power, a finding of monopoly must fall where, as here, the accused defendant has a minority position in the industry (with the exception of one year and then only on one statistical basis), and such position was properly attained through technological and business efficiency.

cf. *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (1948);
United States v. *International Harvester Co.*, 274 U. S. 693 (1927);
United States v. *United Shoe Machinery Co.*, 247 U. S. 32 (1918).

Against this background, we turn to the fact here:

A. Besser's percentage of the industry.

The government charged that Besser Co. and Besser had "acquired and obtained control over approximately 80% of the production of such [concrete block] machines" (R. 10). No matter how the evidence is viewed, this charge was not established.

The Court used "dollar sales" of the industry (R. 1013). More accurately, these were the "dollar value" figures summarized at page 9, *supra*, of this brief, which included "value" for the Besser Co. machines which were leased rather than sold. In so doing, the Court added Besser Co. and Stearns together for the entire period 1946-8. This was improper, since Besser Co.'s stock interest in Stearns, originating with the purchase in 1948, could not have had

any effect until the meeting of stockholders in May, 1948. Olsen testified flatly that Besser Co. never influenced Stearns during the 1942-8 period. If it were proper to add Besser Co. and Stearns production for any period, it could only be for that from May 1 to Dec. 31, 1948. No allocation of Stearns' figures for 1948 was in evidence, but a close approximation can be reached by allocating two-thirds of Stearns' production for the year to the eight months May through December. The dollar value figures, correctly stated, then would be:

	1946	*1947*	*1948*
Besser Co.	33.9%	47.8%	52.1%
Stearns (pro rata estimate after May 1, 1948)..			8.6%
			60.7%
Other manufacturers (including Stearns until May 1, 1948)	66.1%	52.2%	39.3%

None of these—even the 1948 statistics—approach the figure alleged in the complaint. No statistics were offered for 1949.

Analysis will demonstrate how misleading gross percentages are.

Besser Co.'s production *declined* from $2,692,500 in 1946 to $2,623,000 in 1948 (Ex. 188, R. 1402, summarized page 9, *supra*); yet Besser Co.'s percentage of the total *increased* from 39% to 52%. The percentage rise reflects the fact that Besser Co. almost held its own while nondefendant manufacurers, with the end of the post-war boom, dropped from $3,990,943 to $1,760,800.

Over $700,000 of the decline in production of nondefendants was in tamping machines (Ex. 188, R. 1402, 1006). Besser Co. has made no tampers since before 1940 (R. 909-10).

In the vibrator field, once the immediate post-war demand was satisfied, success depended on the initiative with which the manufacturer met the need for better machines. Exhibit 190 (R. 1408-12, 1006) shows this. In 1947 Besser Co. introduced a new machine with 750 block hourly capacity. In 1948 these new models accounted for 78% of the "dollar value" of its output. In 1947 Stearns introduced a new model with 720 per hour capacity: in 1948 that model accounted for 52% of its production.

Of the numerous other vibrator manufacturers, only six introduced improved models during these years. Fleming brought out a new model, and its production rose from $200,512 to $208,850, with over 85% in the new model. Columbia Machine did the same, and its "value" rose from $17,246 to $65,000, not allocated as to source. F. C. George Co. also introduced a new model, and the sales of its original small model fell from $330,676 to $23,827, while the new model rose in two years from zero to $182,805. *No witnesses appeared from any of these companies.*

Three manufacturers who tried larger models were unsuccessful: Winn, Gravely, and Darden. *All three of them appeared as government witnesses.*

In short, 1946-48 were significant years for competent manufacturers who had the initiative and engineering skill to develop new models which performed satisfactorily. Besser Co., by following the trend of demand, almost held its own; but because it did so in a declining market its percentage of the industry total increased.

The inertia of competitors content to continue the production of outmoded machines could pose for Besser Co. a neat dilemma. Is it the duty of Besser Co. to cease improving its machinery and cut its production to reduce its percentage? Such is the necessary consequence of legal reasoning which finds evidence of a Sherman Act violation by looking solely at percentage figures and condemns a percentage rise resulting from a constant sales volume maintained by model improvements.

If percentage figures are deemed significant, a more accurate appraisal of Besser Co.'s position would result from analysis of the number and productive capacity of machines produced by the forty-odd manufacturers. All concrete blocks of the same size are interchangeable, regardless of the type or capacity of the machines on which they are produced. A local operator does not select his machine because of its "dollar value." His only interest is in the number of blocks it produces, and he buys or leases the machine which will give him the output his market will absorb.

However viewed, the figures on machines and productive capacity do not establish monopolization by Besser Co. and Besser, *the only two defendants charged with that violation.* In 1946-8, over 84% of the 8080 machines produced were made by non-defendants; and these machines accounted for 68.3% of the productive capacity added to the industry in those three years (see table, page 8). Besser Co. produced only 6.1% of the machines, principally large models which accounted for 18.0% of the new capacity. Stearns Co. had 9.6% of the machines manufactured, with 13.7% of the capacity.

B. Absence of power to exclude competitors.

The very figures which establish that Besser Co. and Besser do not have a monopoly from a statistical point of view likewise demonstrate that neither of them meets the ultimate test of monopoly power, i.e., the "power to exclude competition when it is desired to do so" (see *United States* v. *Paramount Pictures,* 334 U. S. 131 at 173 (1948)).

No man could have been in a better position to appraise Besser Co.'s "power to exclude competitors" than was Olsen when he sold his Stearns stock in the spring of 1948. Closely associated with Gelbman and Andrus since 1934, Olsen had been a dominant figure in all transactions from 1942-8 now claimed to be conspiratorial. With nearly thirty years of activity in the industry, he was not a youth when

he received the $800,000 for his stock. But he promptly re-entered the industry, was in production by the end of the year, produced 10 machines in 1949, doubled that number in 1950, and (assuming normal material flow) was tooled to produce 48 in 1951 (R. 1052, 1054).

Milewski's record likewise rebuts any Besser Co. "power to exclude competitors." In 1946 he made 2 machines; in 1947, 29; in 1948, 45 (Ex. 184, R. 1397, 999); and in 1951 he was tooled to produce 72 (R. 1049). This is the machine claimed to infringe existing patents, and so held by the lower court, with a reversal in the court of appeals which is not yet final. If the machine is held to infringe, presumably Milewski will release a model, as other manufacturers have done, which does not infringe. But the four-year growth of his company clearly refutes any claim that Besser Co. has "power to exclude" competitors.

Other illustrations of companies which have prospered because they met the demand of the market have been given in the preceding subdivision of this point. It is unnecessary to multiply examples. The statistical record, of course, shows the important position of Besser Co. which resulted from the technological and commercial factors previously outlined. But the statistical record even more significantly demonstrates the ability of able competition to enter the industry and to prosper. Such a showing is wholly inconsistent with a claim of monopolization.

It is therefore respectfully submitted that the finding and conclusion that Besser Co. and Besser monopolized interstate commerce is clearly erroneous.

POINT II

The 1942 patent license was valid, and evidenced neither an unlawful monopolization or attempt to monopolize nor an illegal combination in restraint of trade.

The trial court concluded that by the 1942 license the defendants Besser Co., Stearns, Andrus and Gelbman had "conspired to restrain and to monopolize" interstate commerce (R. 1028).

This finding is challenged as clearly erroneous.

Every patent confers a monopoly over the patented process, method, or apparatus for a limited period. As declared in *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32 at 57 (1918):

> "Of course, there is restraint in a patent. Its strength is in the restraint, the right to exclude others from the use of the invention, absolutely or on the terms the patentee chooses to impose. This strength is the compensation which the law grants for the exercise of invention. Its exertion within the field covered by the patent law is not an offense against the Anti-Trust Act."

There is an apparent—but only an apparent—conflict between the public policy manifested in the statutory monopoly granted to a patent owner and the public policy manifested in the antitrust laws. As stated in *United States* v. *Line Material Co.*, 333 U. S. 287 at 308 (1948):

> "During its term, a valid patent excludes all except its owner from the use of the protected process or product . . . This monopoly may be enjoyed exclusively by the patentee or he may assign the patent 'or any interest therein' to others . . . [A] patentee may license others to make and vend his invention and collect a royalty therefor. Thus we have a statutory monopoly by the patent and by the Sherman Act a prohibition, not only of monopoly or attempt to monopolize, but of every agreement in restraint of trade" (Citations deleted).

The apparent conflict is resolved by barring the patentee from utilizing his patent right to gain a monopoly in areas not covered by the patent.

In *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436 at 456 (1940), this Court stated the applicable principle:

> "The patent law confers on the patentee a limited monopoly, the right or power to exclude all others from manufacturing, using, or selling his invention . . . The extent of that right is limited by the definition of his invention, as its boundaries are marked by the specifications and claims of the patent . . ." (Citations deleted).

This conception was reiterated in *United States* v. *Line Material Co.*, 333 U. S. 287 at 308-309, 310 (1948):

> "The progress of our economy has often been said to owe much to the stimulus to invention given by the rewards allowed by patent legislation. The Sherman Act was enacted to prevent restraints of commerce but has been interpreted as recognizing that patent grants were an exception . . . The monopoly granted by the patent laws is a statutory exception to this freedom for competition and consistently has been construed as limited to the patent grant . . . It is not the monopoly of the patent that is invalid. It is the improper use of that monopoly" (Citations deleted).

Within these general limitations, we must analyze the 1942 patent license agreement. We start with Gelbman and Andrus being awarded patents on methods and processes applying the principle of vibration under pressure in concrete block machines: patents the validity of which is not in issue here. (Government Memorandum in Opposition to Motion for Adjournment, March 1952, p. 2.) These were not the first patents in the field of vibration. Vibration was a recognized method of compacting the aggregate before the Gelbman patents (R. 925). Gelbman showed how to add vibration under pressure, so that the top of the block was compacted properly and it was brought "down to an accurate height" (R. 925-6). At this point, Gelbman as the patentee-inventor "gets nothing from the law that he did

not have before and . . . the only effect of his patent is to restrain others from dealing with or using [his] device." *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32 at 57 (1918).

Gelbman and Andrus had a choice of courses: they could decline to use the patents (*Special Equipment Co.* v. *Coe*, 324 U. S. 370 (1945)); could exploit their patents themselves, excluding all others (*United States* v. *Line Material Co.*, 333 U. S. 287 (1948); *United States* v. *Dubilier Condenser Corp.*, 289 U. S. 178 at 186-7 (1933)); or could license others "to make, use or vend, restricted in point of space or time, or with any other restriction upon the exercise of the granted privilege, save only that by attaching a condition to [their] license [they might] not enlarge [their] monopoly and thus acquire some other which the statute and the patent together did not give."

Ethyl Gasoline Corp. v. *United States*, 309 U. S. 436 at 456 (1940);
United States v. *Line Material Corp.*, 333 U. S. 287 at 308 (1948);
General Pictures Co. v. *Electric Co.*, 304 U. S. 175 at 181 (1938).

Exercising their privilege to license, they could grant the right to all applicants (*United States* v. *Line Material Co.*, 333 U. S. 287 at 308 (1948)); or they could license some and withhold it from others, "a right of selection of persons and terms" (*United States* v. *United Shoe Machinery Co.*, 247 U. S. 32 at 58 (1918)).

Gelbman and Andrus elected, beginning in 1934, to grant Olsen the exclusive right to exercise their patent monopoly. This they had a right to do.

R. S. Sec. 4898, 35 U. S. C. Supp. V, §47, 35 U. S. C. A. §47.

During the next eight years, Olsen enjoyed a monopoly of the licensed patents. No criticism was or could be di-

rected to the part played by his license under the Gelbman patents in the success of his company. Yet during those years—years in which it is now charged with attempted monopoly—Besser Co., like every other competitor, was barred by Olsen's exclusive license from using the Gelbman patents.

Of course, the license to Olsen deprived Gelbman and Andrus of the power to license another unless Olsen waived its exclusive features. This is inherent in any exclusive license, and the license is not shorn of validity by explicit statement of its inherent effect.

Cf. Bement v. *National Harrow Co.*, 186 U. S. 70 at 94 (1902).

In 1940 Gelbman, Andrus and Olsen (through Stearns) unsuccessfully sought to establish that the Besser machine infringed one of their patents. They appealed the adverse ruling of the trial court. Pending the appeal, Olsen, Gelbman and Andrus negotiated a settlement which was formalized in the 1942 agreement, drafted by their counsel. Such settlements of patent actions are not uncommon, and have the approval of this Court. So in *Standard Oil Co.* v. *United States*, 283 U. S. 163 at 171 (1931), this Court, through Mr. Justice Brandeis, declared:

> "Where there are legitimately conflicting claims or threatened interferences, a settlement by agreement rather than litigation, is not precluded by the [Sherman] Act."

See also: *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 51-52 (1918);

United States v. *Aluminum Co. of America*, 44 F. Supp. 97 at 113 (S. D. N. Y. 1941), aff'd 148 F. 2d 416 (2d Cir., 1945).

The patent license of December 7, 1942 is described by the Court, in a somewhat rhetorical paragraph, thus:

"This deal was the climax" (R. 1020).

Since the court did not find unlawful anything occurring prior to 1942, it is not clear what the agreement "climaxed." Such a description manifests the attitude of the trial court which condemned every action of appellants, beginning with that date.

In essence, aside from reciting the settlement of the litigation, the license did two things which are criticized:

(a) It granted licenses to Stearns and Besser Co., each exclusive except for the other, and provided that further licenses could be granted only upon the consent of the licensees. The Court said: "It is this combination requiring collective action that primarily invalidates the agreement" (R. 1021).

The only case cited in the opinion (R. 1021), *United States* v. *Parker-Rust-Proof Co.*, 61 F. Supp. 805 (E. D. Mich., 1945), gives no support to the trial court's conclusion. The *Parker* case, like this action, was a wholesale attack upon the activities of the defendants. The trial court there absolved the defendants of every accusation save one. That charge involved a contract between Parker and American Chemical Paint Co., a competitor, whereby in settling patent litigation Parker in effect bought out American and American retired from business, with a permanent injunction barring it from carrying on the process it had been promoting. It was found as a fact that this agreement "between American and Parker was intended to eliminate American as a competitor and it had that result" (61 F. Supp. at 811, Finding 19). It was this contract which the Court condemned in the language quoted in the opinion below (R. 1021).

The 1942 license had no such purpose or effect. To make the situations analogous, Stearns would have had to sell to Besser Co., or vice versa, and the seller would have had to retire permanently from business. Instead, the two licensees remained vigorous competitors. Nothing in the license could affect their competitive struggle. Its only effect was to eliminate litigation between them as to the

Gelbman patents, and leave each one free to exploit such patents in its machines.

No one here argues that the prior license exclusively to Olsen (Stearns) was unlawful. Admittedly Stearns and Besser Co. were vigorous competitors. Certainly competition between them was furthered, rather than restrained, by giving both access to the patents.

Does the fact that the license ran to two competitors, exclusive save for the other, make it a violation of the Sherman Act? If so, this will be the first case so to hold. Nothing in prior cases even suggests that a patentee must choose between (i) using the patent himself, (ii) licensing only one person, or (iii) licensing all comers. So far, the cases indicate to the contrary.

In *Extractol Process* v. *Hiram Walker & Sons*, 153 F. 2d 264, at 268 (7th Cir., 1946), it is stated:

> "The patentee is the sole judge of the licensee he shall select . . . No legitimate attack can be made on the patent or patent grant because the patentee chooses A and B as its licensees and refuses a license to X, Y, or Z . . . He may make A an exclusive licensee and he may make B as limited a licensee as he and B may agree to. In other words, patentee may grant both broad and narrow licenses."

In *Flexwood Co.* v. *Faussner & Co.*, 145 F. 2d 528 (7th Cir., 1944), it is specifically held that a "joint exclusive license" is not *per se* invalid. The contention that the license violated the antitrust laws was rejected in the following language:

> "The defendant complains because the two licensees have a joint exclusive license. Possibly such a license might under some circumstances be a vehicle for illegal action but we find nothing in the circumstances of this case to indicate illegality." (p. 539)

Every exclusive license, by its very grant, prevents the licensor from granting a license to another. An exclusive license in which the licensor remained free to license others

would be a logical and legal impossibility. Whether the restriction on further licenses is or is not explicitly stated does not affect either the rights granted or the licensor's power. Since it is lawful when implicit, how can it be unlawful when expressed?

The trial court could see no reason for the exclusivity, accompanied by the requirement of consent, other than "that the parties intended this contract to be a means whereby control of the industry could be acquired and competition eliminated" (R. 1021). That the Gelbman-Andrus patents did not offer "control of the industry" is apparent from the statistics, which show over forty companies engaged in the business. It is obvious also from the fact that it dealt only with the application of pressure during vibration, leaving manufacturers free to use vibration in any other manner. It is clear likewise from the fact that numerous other manufacturers of vibrating machines are making products which do not infringe.

Of course, a patent may be so used as to violate the anti-trust laws and an act lawful in itself may be unlawful because it is a part of a conspiracy. If the 1942 patent license were shown to be a part of a conspiracy— if there were any evidence to suggest that an unlawful combination had been formed—it would fall. But that was not the contention of the government: the government asserted rather that the license was illegal *per se*.

The government, committed to its theory that the license was *per se* illegal, offered no evidence whatsoever to support a finding that the mere grant of the license was either itself a combination or conspiracy, or the result of one. There is no evidence that the 1942 license resulted from anything save the legitimate desire of the patentees to settle the litigation they had started, and to consummate that settlement by licensing their patents to two reliable manufacturers, potential sources of satisfactory royalty income. There was in the license none of those indicia which point to an unlawful conspiracy, or an improper effort to extend the scope of the patent monopoly. There was no limit on

the type or volume of production; no division of available markets or territory; no effort to dominate an industry by fixing prices.

See *United States* v. *New Wrinkle, Inc.*, 342 U. S. 371 (1952);
United States v. *Line Material Co.*, 333 U. S. 287 (1948);
United States v. *United States Gypsum Co.*, 333 U. S. 364 (1948);
Ethyl Gasoline Corp. v. *United States*, 309 U. S. 436 (1940).

There was no agreement that the licensee would assign present or future patents to the licensors; no provision for cross licensing; no pooling of existing or future patents and know-how; no effort to tie the use of the patents to the use of unpatented materials, processes, or devices.

See *Timken Co.* v. *United States*, 341 U. S. 593 (1951);
United States v. *National Lead Co.*, 332 U. S. 319 (1947);
International Salt Co. v. *United States*, 332 U. S. 392 (1947).

Entitled to a total monopoly in the use of their patents, all that Gelbman and Andrus did was to agree, for a substantial royalty, to divide that lawful monopoly exclusively between two companies. Undoubtedly, if Besser Co. had been the patentee it could have granted its competitor Stearns an exclusive license, subject to its own right to use the patents.

See
Independent Wireless Co. v. *Radio Corp.*, 269 U. S. 459 at 461 (1926);
United States v. *General Electric Co.*, 272 U. S. 476 at 488-9 (1926).

Is the situation any different where a non-manufacturing patentee makes an agreement of like effect? The agreement to license Stearns and Besser Co. exclusively is not an extension but rather a diminution of the patent monopoly of Gelbman and Andrus.

United States v. *United Shoe Machinery Co.*, 247 U. S. 32 (1918);

Extractol Process. v. *Hiram Walker & Sons*, 153 F. 2d 264 (7th Cir., 1946).

(b) The second criticism of the 1942 license was that, as part of the consideration for the royalties to be paid by Stearns and Besser Co. to Gelbman and Andrus, the patentees agreed that the license should extend to "all improvements or inventions hereafter made by Licensors, or either of them, during the term of this agreement, in concrete block making machines of the vibrating type" (R. 1203-4). Significant in this connection is the fact that although the license on existing patents was to last through the life of such patents, the agreement as to improvements or future inventions was to terminate on July 1, 1952, unless renewed or extended by mutual agreement (R. 1206).

In support of its conclusion, the trial court cited three cases (R. 1022).

(1) *United States* v. *National Lead Co.*, 63 F. Supp. 513 at 524 (S. D. N. Y., 1945). The discussion in 63 F. Supp. at 524 deals with defendants among whom "the closest cooperation prevails. Territories are allotted; patents and patent applications are interchanged and cross-licensed; technological information or 'know-how' of one is promptly made available to the other. . . . Each operates in its own exclusive territory. . . . Competition among them is non-existent" (63 F. Supp. at 522). In this factual context, an agreement to license future patents was condemned. But in the present case, none of these elements was present. The two licensees, Stearns and Besser Co., were and remained vigorous competitors. They allotted no

territory, exchanged no patents or know-how, fixed no prices. If the *National Lead* case is authority here, then any patent license which gives the licensee access to future patents must fall.

(2) *United States* v. *General Electric Co.*, 80 F. Supp. 989 (S. D. N. Y., 1948). The discussion of improvement patents in this opinion comes in the middle of a review of widespread activities indicated by the subheadings employed by Judge Knox: cross-licensing of patents with one licensee fixing prices for all; licenses providing price control over unpatented products; resale price fixing; boycotts; territorial division of markets; purchase of competitors; and direct price fixing. Not one of those indicia of conspiracy is shown here. As one of these many subheads, the Court in the cited case referred to licensing on condition that the *licensee* shall assign or cross-license future patents. There was no such provision in the 1942 patent license. Each licensee retained complete freedom to develop its own patents. All it received was the right to license patents on improvements and inventions of the *licensors*. The *General Electric* case is not in point.

(3) *Transparent-Wrap Machine Corp.* v. *Stokes & Smith Co.*, 329 U. S. 637 (1947). This case is discussed below.

This Court has pointed out that:

> "An improvement patent may, like a patent on a step in a process, have great strategic value. For it may, on expiration of the basic patent, be the key to a whole technology."
>
> *Transparent-Wrap Machine Corp.* v. *Stokes & Smith Co.*, 329 U. S. 637 at 642 (1947).

There is nothing abnormal or unusual, much less illegal, in *licensees* making sure that, being committed to pay substantial royalties on each machine they produced under the patents, they should also have the benefit of future improvements in those patents or of related inventions which other-

wise might destroy the value of their product. This affords a proper and basic protection, and there is no illegality in its negotiation as a part of the over-all consideration.

Cf. Transparent-Wrap Machine Corp. v. *Stokes & Smith Co., supra.*

In *Aspinwall Mfg. Co.* v. *Gill*, 32 Fed. 697 (C. C. N. J. 1887), app. dis. 140 U. S. 669 (1891), the court lucidly set forth the reasons for such an agreement:

> "That such assignments of future improvements upon a machine, in connection with the assignment of a patent for such machine, are valid, is settled, I think, by the case of *Littlefield* v. *Perry*, 21 Wall. 226 . . . [W]here a man purchases a particular machine secured by a patent, and open to an indefinite line of improvements, it is often of great consequence to him that he should have the benefit of any future improvements that may be made to it. Without that, the whole value of the thing may be taken away from him the next day. A better machine might be made by the inventor, and sold to another party, which would make the machine acquired by the first purchaser entirely useless. These things happen every day. And hence it has become the practice, in many cases, to stipulate for all future improvements that may be made by the same inventor upon any particular machine which he induces a party to purchase from him, sometimes by way of license to use such improvements, and sometimes by way of purchase and ownership thereof . . . If based upon a valuable consideration, they are sustained as collateral or incidental stipulations connected with the conveyances of a principal subject" (700-1).

Of like tenor is *Westinghouse Air-Brake Co.* v. *Chicago Brake & Mfg. Co.*, 85 Fed. 786 at 795 (C. C. Ill., 1898):

> "But men will not pay much for a right that may to-morrow be the common possession of their competitors; nor will they, for the same reason, pay much for an invention that may to-morrow be outclassed by another from the same brain. Purchasers of rights under patents realize more keenly than others that one invention is, in all probability, only the

> father to a train of others, and that the offspring will soon displace its predecessor. A full monopoly, therefore, is not obtained unless the outgrowth, as well as the original root, of the conception is secured. On this basis alone will capital deal upon any liberal scale for the inventor's property. It is along these lines of commerce, inevitably regulating true value, that the inventor's real chances for compensation must be found. The public policy that recognizes this, and does not attempt, out of momentary or special considerations, to fly in its face, is the only policy truly advantageous to the inventive class."

See also:

Littlefield v. *Perry*, 21 Wall. (U. S.) 205, 226 (1874);
Flakice Corporation v. *Short*, 115 F. 2d 567 (2d Cir. 1940);
West Disinfecting Co. v. *United States Paper Mills*, 44 F. 2d 803 (3d Cir. 1930), cert. den. 283 U. S. 836 (1931).

There is no evidence that Stearns and Besser Co. were doing anything more than thus protecting themselves. Since they would have been free to buy or secure licenses under any future Gelbman-Andrus patents at some future date, there is no reason why they should not bargain for them in advance as part of the original.

Transparent-Wrap Machine Corp. v. *Stokes & Smith Co.*, 329 U. S. 637 at 642 (1947);
United States v. *Bell Telephone Company*, 167 U. S. 224 at 249-250 (1897).

Since the parties were within their rights in granting and receiving a dual exclusive license which covered for a limited period improvements and future inventions in the same field, it is respectfully submitted that the finding that it was illegal and a combination or conspiracy in restraint of trade, as well as a step in the appellants' attempt to monopolize, is clearly erroneous.

POINT III

Appellants' efforts to prevent the infringement of their patent rights did not violate either § 1 or § 2 of the Sherman Act.

The 1942 patent license agreement made the enforcement of the Gelbman-Andrus patents the proper and lawful concern of all of the defendants. Appellants had, and still have, a *bona fide* belief in the validity of all patents which they own or under which they are licensed. The decision of the trial court upholding the validity of the Scott and certain of the Gelbman patents establishes beyond question the reasonableness of that belief (see *Andrus* v. *Whitman*, 93 F. Supp. 383). The subsequent reversal of that decision (as to which a petition for certiorari is in preparation) does not impair the reasonableness of the belief, or the good faith of defendants and their counsel in entertaining it. As the government concedes, the validity of the patents is not in issue.

The patents, if valid, were being widely infringed (see pages 15-19, *supra*). The owner or licensee of a patent undoubtedly is entitled to protect his rights against acts which he believes to infringe. During the trial, the judge recognized this (R. 558-60). Whatever else may be said of the early case of *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Co.*, 154 Fed. 358 (7th Cir., 1907), no decision has yet impaired its succinct statement that "the public was not entitled to profit by competition among infringers" (p. 364). There was no impropriety in the joint nature of the enforcement attempted by Stearns and Besser Co., and the fact that the license agreement provided for mutual reimbursement or contributions between the interested parties did not make such efforts illegal.

See *Morny* v. *Western Union Telegraph Co.*, 40 F. Supp. 193 (S. D. N. Y., 1940);
Davis v. *A. H. Reid Creamery & Dairy Supply Co.*, 187 Fed. 157, 158-159 (C. C. Pa., 1911), aff'd 195 Fed. 80 (3d Cir., 1912).

The years 1945-1948 were years in which an abnormal post-war boom, designed to catch up with war shortages, gave tempting promise of rich rewards to those prepared to risk infringement (see pages 19-20, *supra*). Against the piracy of their patent rights, the defendants countered with efforts to enforce their patents. "It is the experience of the world that the utility of an invention entices to its infringement, but it would be a perversion of things to facilitate the wrong by a sacrifice of the [patent] right in revulsion from the restraint which the [patent] right imposes."

> *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32 at 57 (1918).

The efforts followed a logical sequence which is consistent only with good faith.

First came investigation. Every charge of infringement rested on inspections or equivalent investigation (see pages 21-23, *supra*). Clearly this was not illegal. The trial court itself recognized the propriety of inspections, his only criticism being that "there were two or three instances where suit was threatened involving machines that agents of defendants had never even seen" (R. 1024). The fact statement reveals that this finding is clearly wrong.

Next came notices of infringement. The trial court described them as "recklessly made threats of suit, illegal under" three cited cases:

(1) In *Maytag Co.* v. *Meadows Mfg. Co.*, 35 F. 2d, 403 (7th Cir. 1929), Maytag had no patents: obviously the threat of infringement actions by representatives of a company that had no patents was reckless and subject to equitable relief. The case was for unfair competition, did not mention the antitrust law, and has no relevance to the issues here.

(2) *Dittgen* v. *Racine Paper Goods Co.*, 164 Fed. 85 (C. C. Wisc. 1905), is also inapposite. That also was an equity action charging unfair competition, and again

the Sherman Act was not involved. Plaintiff and defendant were the only companies making paper cigar pouches. Plaintiff for 20 years has made such pouches, for the last 5 years under patent. The defendant, fully informed of this, had engaged in a widespread propaganda campaign through instructions to salesmen, a "large number of letters," and contact with "a multitude of witnesses," charging infringement of its patents. Not only had defendant failed to sue: it had ignored plaintiff's request that it sue and his offer to accept process. Properly the court concluded that "all charges of infringement against complainant, were falsely and maliciously made" (164 Fed. at 88).

Contrast the facts here, where infringement is virtually conceded if the patents are valid. The notices of infringement were directed almost exclusively to manufacturers. In January, 1947, an action was brought against Darden and settled at his instance. Shortly afterward an action was started against Milewski and litigated through the district court and the court of appeals, and is yet not finally determined. It is not required that a patent owner file a multitude of suits: that in itself can be an abuse, as noted in the *Dittgen* case, p. 89, citing *Commercial Acetylene Co.* v. *Avery Co.*, 152 Fed. 642 (C. C. Wisc., 1906). As stated in *H. W. Johns-Manville Co.* v. *Lovell-McConnell Mfg. Co.*, 212 Fed. 923 at 925 (2d Cir., 1914):

> "It is well settled that the owner of a patent is under no obligation to prosecute every supposed infringer simultaneously; it is entirely consistent with good faith on his part to wait until the decision in a test case has determined the validity and scope of his patent."

Here the defendants proceeded with promptness to follow the charges with test cases: there was no impropriety in this.

There is no evidence of a reckless campaign against prospective customers. There is not a single letter or other writing from Besser Co. or Besser to any prospective customers, referring to infringements. The admissible evi-

dence (see pages 24-27, *supra*) shows that the patent problem was mentioned to only four block machine users. Three of the four were interested in machines which were made by Darden or Milewski, both of whom were defendants in test cases. In no instance did the passing reference to the patent situation affect the user's decision as to the type of machine he bought. This falls far short of the type of propaganda campaign which in the *Ditfgen* case was condemned as false and malicious.

(3) *United States* v. *Patterson*, 205 Fed. 292 (S. D. Ohio, 1913), has no relevance whatever. It was a ruling on evidence. There is no mention in the case of "recklessly made threats of suit," the point on which it is cited below. The court held, on the contrary, that the defendants could show that a competitor knew of the patents and was advised of its infringement, as explanatory of its retiring from business. This holding was approved, but the case was reversed on other grounds, in *Patterson* v. *United States*, 222 Fed. 599 (6th Cir., 1915), cert. den. 238 U. S. 635 (1915).

That a patentee who believes in good faith that his patents are valid and infringed is entitled to notify the infringers of the illegality of their activities will hardly be questioned. Here, as in *Oil Conservation Engineering Co.* v. *Brooks E. Co.*, 52 F. 2d 783 at 785 (6th Cir., 1931):

> ". . . . the situation was the not uncommon one where the older manufacturer has patents which seem to cover the competitive article. The patents are presumedly valid. Litigation is expensive and to be avoided, if possible. Notices to the competitor that he is infringing, and perhaps to the manufacturer for the competitor, and to a limited number of his chief customers, are the normal procedure and not to be condemned, when characterized by good faith."

The fact that suits for infringement may interfere with the business of the infringer is not a violation of the Sherman Act.

Morny v. *Western Union Telegraph Co.*, 40 F. Supp. 193 (S. D. N. Y., 1940).

Publicity given to past or pending infringement actions likewise does not violate the Act.

> *International Visible Systems Corp.* v. *Remington-Rand*, 65 F. 2d 540 (6th Cir., 1933), cert. den. 296 U. S. 618 (1935).

This Court has aptly said:

> "Patents would be of little value if infringers of them could not be notified of the consequences of infringement or proceeded against in the courts. Such action considered by itself cannot be said to be illegal. Patent rights, it is true, may be asserted in malicious prosecutions as other rights, or asserted rights, may be. But this is not an action for malicious prosecution. It is an action under the Sherman Anti-Trust Act for the violation of the provisions of that act, seeking treble damages."
>
> *Virtue* v. *Creamery Package Co.*, 227 U. S. 8 at 37-8 (1913).

After notices of infringement came litigation. Actions were brought against customers of Darden and Milewski. There is no evidence and no finding that these actions were malicious. The Darden case was settled at his instance, with the advice and cooperation of his counsel. The Milewski case was won in the trial court, reversed on appeal, and is not yet closed. The institution of such actions was not a violation of the Sherman Act.

> *Morny* v. *Western Union Telegraph Co.*, 40 F. Supp. 193 (S. D. N. Y., 1940).

Prior to or alternative to litigation there were negotiations.

The trial court condemned the efforts to compel patent respect as part of "a deliberate campaign to wipe out all remaining competition" (R. 1023).

In elaboration he mentioned claimed efforts to buy out Olsen and Lith-I-Bar, the purchase of a patent of Bernard Flam, and offers of jobs to Olsen and the Milewskis. These will be treated in Point IV below.

The Court then mentioned seven names as men who "felt the persuasion of the Besser arguments": Warren, Milewski, Darden, Samuelson, Hanneman, Lagarde, and Bernard Flam (R. 1023). It found that "practically all of these men [1] got out of their own business, [2] generally impelled by threats of lawsuits, [3] being given a job, [4] pressure on customers, [5] or all three, and [6] usually Besser picked up their then patents with a mortgage on the fruits of their genius for years to come" (R. 1023). The bracketed numbers are inserted for convenient reference. Bernard Flam will be discussed later.

The evidence with respect to each of these individuals is summarized in the statement of facts, *supra*, pages 21-24, 27-33. This summary reveals:

[1] Warren, Samuelson and Lagarde did *not* get out of business. They never built machines for sale. Milewski and Darden did *not* get out of business: the former continued manufacture while contesting the patent litigation, Darden had an unexpired license under the Gelbman patents, and obviously could continue indefinitely to manufacture non-infringing machines, as Appley was doing in the same geographic area. Hanneman still had a license and if he was out of business it is not surprizing in view of his lack of knowledge of the industry and his inability to deliver an operating machine. Winn, not mentioned by the judge, was out of business because, as he himself said, there was no longer a demand for the type of machine on which he had his temporary post-war boom, and successors were continuing his business.

[2] It is not disputed that most of these men were notified of their infringements. Besser stated that his company "was always careful not to threaten anybody" (R. 942). The trial court commented: "I don't mean 'threaten' in a way that is wrong. I mean 'advise'." (R. 942). If the court used "threaten" in its opinion, as it did at the trial, as synonymous with "advise," then there is no dispute that most of them were advised of their infringement.

[3] Not one of the persons named in the opinion was "given a job."

[4] The admissible evidence disproves any contention that "pressure on customers" caused anyone to get out of business. The only "customers" to whom patents were mentioned before they had purchased machines were those of Olsen and Milewski, both of whom were manufacturing on the date of the hearing on relief (see Olsen testimony, R. 1052, Milewski R. 1049).

[5] In no instance could "all three" be supported by the record.

[6] Besser Co. acquired no patents from Warren, Milewski, Darden, Samuelson or Hanneman. Besser Co. did acquire rights under a patent application of Lagarde, in connection with an agreement for cooperative development activities. This agreement is summarized at pages 31-32, *supra*. Lagarde did not testify, and there was no other evidence about the circumstances. Consequently, there is no basis whatsoever for condemning the contract. And certainly an agreement with one of six named individuals hardly warrants the court's characterization as "usual."

The trial court then stated that Besser "attempted to limit Appley" to two-at-a-time cored pallet machines (R. 1023). It is undisputed that Appley never made any other type of machine. In the three years 1946-1948 he made 1750 such machines. There is no evidence that he ever indicated an interest in shifting his operations to a different type of machine. It is undisputed that all he asked was a license for use of the patents on the type of machines he was making. Obviously, the grant of a license covering use of the patents on one type of product "does not mean that the licensee is prohibited from manufacturing or selling other apparatus."

Automatic Radio Co. v. *Hazeltine*, 339 U. S. 827 at 831 (1950).

Thus Besser Co. was condemned for its willingness to grant Appley what he asked.

The court then quoted from a Besser letter to Gelbman of December 21, 1946 that "about the worst thing that could happen to this industry would be to have it wide open so that anybody and everybody could make machines and thus have no control on quality and no opportunity for anyone to do anything very important" (R. 1024). This letter referred to the infringement action against Darden and in fairness must be read in context.

The occasion for the letter was the reimbursement of Gelbman for infringement suit expenses and the approval of proposed advertisements notifying manufacturers of the patent rights of Gelbman and Andrus. That Besser's interest was limited to protection of his right by legitimate means is evident from the concluding paragraph, not quoted by the trial court:

> "We will support you in every way on this Louie [Gelbman] and we will work together and use *every proper means* to take care of this situation" (Ex. 71, R. 1271, offered R. 814).

To construe the letter as evidencing an intent to crush legitimate competition is to construct a proclivity to wrongdoing from a reasonable objection to patent infringement.

The opinion then commented that "there were other letters that denote Besser's objective to accomplish the elimination of almost every competitor" (R. 1024). A specific finding would have been helpful. All relevant exhibits have been printed. The remaining letters from Besser or Besser Co. are exhibits 7 (R. 1187, 66), 16 (R. 1213, 801), 19 (R. 1215, 813-4), 32 (R. 1252, 805-6), 38 (R. 1255, 806), 56 (R. 1263, 814), 63 (R. 1266, 808), 79 (R. 1277, 810-1), 95 (R. 1291, 815-6), 97 (R. 1294, 812), 98 (R. 1295, 812), and 135 (R. 1349, 368). Most of them are referred to in this brief and they will not be summarized here. Not one of these exhibits supplies any support for the finding that they "denote" an "objective to accomplish the elimination of

almost every competitor." That finding, if such it be, is clearly erroneous.

This concludes the review of those portions of the opinion which condemned the efforts of appellants to protect their patent rights. It is respectfully submitted that there is clear error in the finding and the conclusion that because of these efforts appellants were guilty of monopolization, attempted monopoly, or restraint of trade, in violation of the Sherman Act.

POINT IV

The residual findings do not support a conclusion that appellants violated the Sherman Act by monopolization or by combination or conspiracy.

Appellants contend that some, though not all, of the remaining findings of the trial court are clearly erroneous. Those not so challenged are believed to result from an incorrect appraisal of the evidence, and would be contested *de novo* if arising in any other action. But in view of the limitations of appellate review, findings which seem to have some support in the evidence will be assumed *arguendo* not to be clearly erroneous. Appellants maintain, however, that such of the residual findings as are not clearly erroneous do not support a conclusion of an unlawful combination or conspiracy or an unlawful monopolization.

A. Findings which are clearly erroneous.

(1) Stephen Flam and Stephen Flam, Inc.

The trial court found illegal the 1946 acquisition by Besser Co. of certain patents of Stephen Flam and certain assets of Stephen Flam, Inc. The trial court declared:

> "The reasonable deduction is that Flam was giving Besser too much competition in the nine states reserved to it. Flam was then fourth in dollar sales in the United States so Besser decided to remove the fly in the ointment." (R. 1019-20)

This finding, we submit, is clearly erroneous.

There is no evidence about these transactions except the contracts themselves (see pages 33-34, *supra*). Unless the purchase of the patents of Flam individually, and the purchase of the assets of Flam, Inc., are illegal *per se*, the finding cannot stand.

Specifically, there is no evidence of the nature of the competition of "Flam" and Besser "in the nine states" or elsewhere. There is no evidence that Besser considered Flam a "fly in the ointment" or decided to remove him. There are no letters or memoranda, no hints of predatory practices, in short, there is nothing save the agreements. Stephen Flam was not called as a witness. No witness was asked a question about the contracts.

We suggest some of the questions unanswered on this record: Who was Stephen Flam? What was his career and experience? What was his relation to the company which bore his name? What was his age and financial condition? Was he a mature and successful business man who chose at the peak of a post-war boom to liquidate an investment and retire to the less onerous but lucrative field of consultation? Who proposed the 1946 transactions and what was their motive? What motivated the directors of Flam, Inc., to approve the transactions? What, if any, effect did the transactions have on Besser Co.'s competitive position? What, if any, effect did they have on the positions of competitors? On these and all other crucial circumstances the record is silent.

Without more, there is nothing illegal *per se* in the acquisition of the stock or assets of a competitor,

United States v. *Columbia Steel Co.*, 334 U. S. 495 at 508, 519, 531 (1948);
International Shoe Co. v. *F. T. C.*, 280 U. S. 291, 297-298 (1930);
cf. United States v. *Associated Press*, 52 F. Supp. 362, 374 (S. D. N. Y., 1943), aff'd 326 U. S. 1 (1945);

whether or not accompanied by an agreement not to compete,

> *Cincinnati Packet Company* v. *Bay*, 200 U. S. 179, 185 (1906);

or a contract to assign future patents to the purchaser,

> *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32 at 52-54 (1918).

If such transactions are unlawful, they become so because of surrounding circumstances shown in the evidence. Here the agreements stand alone, without the production of any facts which taint them. In this situation, they fail to show any illegality.

(2) Bernard Flam agreement.

The trial court stated that ". . . Bernard Flam, son of Stephen . . . felt the persuasion of the Besser arguments . . ." (R. 1023)

If this be treated as a finding of illegality, it is, we submit, clearly erroneous.

What "arguments" did Besser make? We do not know. Did Flam "feel" their "persuasiveness"? We are not told. Again, we have nothing save the contract (Ex. 99, R. 1296, 816). Such questions as are listed with respect to Stephen are likewise unanswered as to Bernard. Bernard Flam did not testify, nor did any other witness mention his name.

Bernard Flam had two patent applications, one already filed. These he sold. What they were, what effect they might have on the technology of block making, what impact they might have on competition—such inquiries are left wholly unanswered. Surely there is no illegality *per se* in the purchase of these applications.

(3) Millard Warren transaction.

The court found that Warren "yielded to pressure, threats, and being offered 'pay' without leaving his own business" (R. 1023).

This finding also, we submit, is clearly erroneous.

Warren never manufactured block machinery for sale. He made blocks (R. 529), and for his own use in his own plants, he built three machines known as Warren 800's (R. 541). Later he licensed Darden to make these machines (R. 530). Darden, it will be recalled, was sued by Gelbman for infringement and the controversy was settled in February 1947 by a license (see *supra*, page 29). Shortly thereafter, Darden, Besser and Stark, patent attorney for Besser Co., met with Warren in his home city to discuss the claim that the Warren machines infringed the Gelbman patents (R. 531-2). Warren claims that about two months later Stark, while still discussing the infringement, suggested that there was a possibility that "we might work together with Besser and I would receive a nominal fee as a salary from the Besser Company, not to go to work for them but to stay where I was, and we were not to build any more machines" (R. 533-4). Warren described this as a "suggestion" (R. 535), and his reply was that he was not interested (R. 535).

It is clear from Warren's testimony that he did not "yield" to anything. He continued in his business as in the past.

B. Findings not challenged as "clearly erroneous."

The trial court made findings adverse to appellants with respect to the acquisition by Besser Co. of a large block of the stock of Stearns Co. There is no dispute that this stock was purchased in 1948. The relevant facts are set out in the summary (*supra*, pages 34-37) and need not be elaborated.

The trial court also found that approaches were made to Olsen of Gocorp and Milewski of Lith-I-Bar suggesting that Besser Co. might buy their companies and employ them (R. 1023). In addition, as noted above, Warren testified to a suggestion of possible employment. Each of these witnesses rejected such suggestions as were made, and each continued his prior activities.

These findings give no support to a conclusion either of monopolization or conspiracy. At most, they support a conclusion of an attempt to monopolize. The provisions of the judgment (R. 1063) which are not attacked on this appeal afford full and appropriate relief for any such supportable conclusion.

Paragraph IV of the judgment requires that appellants divest themselves of the Stearns' stock. This provision is not questioned. Though it is undisputed that neither Besser nor Besser Co. has attempted to influence the management of Stearns, appellants concede that the stock holdings are sufficient to give them a strong voice if they elect to assert it. The appellants have sought to dispose of this stock, and their sole assignment upon this appeal is as to the length of time allowed for such divestiture. The mechanics prescribed by the trial court, which would have required divestiture in 78 days from the date of judgment, are believed unduly harsh, but a provision for terminating the power to vote the stock, while allowing time for the orderly liquidation of the investment, will be suggested as a method of dissipating the situation.

Paragraph V(A) of the judgment enjoins the appellants from acquiring, directly or indirectly, in any manner, the business or assets of any person engaged in any part of the concrete block machine business, except after leave of court granted at a hearing of which the Attorney General will have notice, and an affirmative showing that the proposed acquisition will not substantially lessen competition. This provision is not questioned.

Paragraph V(B) enjoins the appellants from having any officer, director, agent, or employee serve in any of these capacities with any other person manufacturing block machines. This provision is not questioned.

Paragraph IX of the judgment enjoins contracts which would prevent another from engaging in the business. The intent of this provision will not be questioned, though it will be urged that as presently worded it is too broad in its

scope. It will not be suggested that it be deleted in its entirety. A modification will be proposed which would allow lawful ancillary covenants under proper safeguards, yet have the injunction effective to bar any unlawful agreements.

Paragraph X of the decree enjoins interference with other manufacturers or their suppliers. The intent of this provision will not be questioned, but it will be suggested that as worded it is too vague and an appropriate modification will be suggested.

Paragraph XI grants wide powers of inspection to the Department. This is not questioned.

Paragraph XII is the usual provision retaining jurisdiction in the trial court. This is not questioned.

A judgment containing the above provisions, with the two modifications proposed, will fully protect the public interest and prevent any future acts which could be open to criticism.

POINT V

The judgment of the trial court erroneously imposes provisions of a punitive and discriminatory nature, inappropriate to the case proved.

A. Applicable principles.

The appropriateness of a given decree—whether it is challenged by the government as inadequate (as in *United States* v. *United States Gypsum Co.*, 340 U. S. 76 (1950) or by the defendants as punitive and excessive (as in *Hartford-Empire Co.* v. *United States*, 323 U. S. 386 (1945))—is a proper item for review in this Court. As stated in the *Gypsum* case:

> ". . . Notwithstanding our adherence to trial court responsibility in the molding of a decree as the wisest practice and the most productive of good results, we

> have never treated that power as one of discretion, subject only to reversal for gross abuse. Rather we have felt an obligation to intervene in this most significant phase of the case when we concluded there were inappropriate provisions in the decree" (340 U. S. at 89).

And in examining into the appropriateness of a decree, it is pertinent to consider the nature of the misconduct found. This was made clear in the *Gypsum* case:

> "... Acts in [conscious] disregard of law call for repression by sterner measures than where the steps could reasonably have been thought permissible" (340 U. S. at 89-90).

For this reason the facts have been summarized to demonstrate that here substantially every act of Besser Co. and Besser was either lawful or "could reasonably have been thought permissible." It is submitted that the facts negative any conclusion that the appellants' acts were motivated by the inherent viciousness which is implied in the almost emotional language of the opinion below.

The considerations pertinent to a defendant's contention that the decree is inappropriate are summarized in *Hartford-Empire Co.* v. *United States*, 323 U. S. 386 at 409 (1945):

> "The applicable principles are not doubtful. The Sherman Act provides criminal penalties for its violation, and authorizes the recovery of a penal sum in addition to damages in a civil suit by one injured by violation. It also authorizes an injunction to prevent continuing violations by those acting contrary to its proscriptions. The present suit is in the last named category and we may not impose penalties in the guise of preventing future violations. This is not to say that a decree need deal only with the exact type of acts found to have been committed or that the court should not, in framing its decree, resolve all doubts in favor of the Government, or may not prohibit acts which in another setting would be unobjectionable. But, even so, *the court may not create, as to the defendants, new duties, prescrip-*

tion of which is the function of Congress, or place the defendants, for the future, 'in a different class than other people,' as the government has suggested. The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt'; enjoin 'all possible breaches of the law'; or cause the defendants hereafter not 'to be under the protection of the law of the land'" (409-10, emphasis added).

More recently the Court took occasion to underline the non-punitive aspects of antitrust relief:

> "Assuming, as is justified, that violation of the Sherman Act in this case has consisted primarily of the misuse of patent rights placing restraint upon interstate and foreign commerce, that conduct is not before this Court for punishment. It is brought before this Court in order to secure an order for its immediate discontinuance and for its future prevention . . ."
>
> *United States* v. *National Lead Co.*, 332 U. S. 319 at 348 (1947).

The judgment provisions which, it is submitted, violate these fundamental principles may be divided into three categories: the lease provisions; the patent provisions; and miscellaneous provisions.

B. Lease provisions.

The judgment directed Besser Co. to give notice within 30 days to each lessee of one of its machines that such lessee could elect, at any time prior to October 1, 1952, either: (1) to terminate the lease at any time prior to January 1, 1953; or (2) to continue under the lease; or (3) to purchase the machine or machines leased and the accessory equipment used "as mutually satisfactory to the parties concerned" (R. 1068). This provision was stayed pending appeal (R. 1176).

We submit that the above provision is erroneous and improper in that (1) the lease program itself is a lawful

form of distribution and the record fails to show that in employing it the appellant violated any law; (2) the judgment provision impairing existing leases, because of its impact upon the business operations and financial structure of the company, is arbitrary, punitive and confiscatory; and (3) this Court has previously condemned analogous provisions.

(1) The lease program is a lawful method of distribution.

Initially, let us examine the record and the opinion to determine what the Court found to be wrong.

We discover first a total failure of proof. The government alleged, in its only reference to these leases, that the lease plan was for the purpose of controlling used machines and preventing their being marketed in competition with new machines (R. 9). There is no evidence pertinent to this allegation, and no finding sustained it. Used machines were not mentioned in the trial or in the opinion. On the contrary, the trial court concluded that the lease plan "of itself is not to be condemned."

The lease program applies only to the front-feed Besser model, while the other models are sold (see page 38, *supra*). A prospective customer thus has a wide choice. He can buy a machine from any of Besser Co.'s forty-odd competitors. He can buy a Besser machine with rear or side feed. Or he may lease a Besser machine with front feed. There is no compulsion on him to choose any one of these options. As this Court said in *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32 at 57 (1918):

> "The old instrumentalities exist for all who are content with them and who care not for the better ones which inventive genius creates."

In the sole reference to the leases in the opinion, the trial court ignored the fact that the policy was limited to one model. He said that distribution by lease "adds to the realization of a complete monopoly" (R. 1025). There is no evidence to sustain this statement. The reasoning which

purports to bolster it is found in one short paragraph (R. 1025):

The trial court pointed out that these large units "run as high as $50,000 each" and "there will be no stampede to buy" since "it is far beyond the reach of the small manufacturer." It seems obvious that a "small manufacturer" will not be interested in a machine that turns out 30,000 blocks each 40-hour week. At the average sales price of 17¢ per block (R. 1028), that reflects an annual production of over a quarter of a million dollars.

The Court continued: "So Besser began the leasing system paid for at the capacity of the machine at 1¢ a block" (R. 1025). If the criticism here is that a local operator will lease a Besser machine because it suits his business situation better not to tie up $30,000 to $50,000 in machinery, where is the illegality in thus adapting distribution to the customer's needs?

The Court went on: "This is possibly as economical as these blocks can be made by hand or by other automatics and the ultimate effect on small companies can easily be visualized" (R. 1025). Apparently the meaning of this elliptic statement is that in a given competitive market, with a demand capable of absorbing 50,000 or more blocks a month, a local operator leasing a Besser machine can produce blocks as cheaply as another local operator using hand or automatic machines which he owns. Is there any requirement in the law that Besser must produce machines on which blocks can not be made so economically? If it means that a leased Besser machine produces blocks cheaper than other machines, is there any violation in Besser's providing a better machine with which a customer can succeed in his own competitive area?

Thus the court concedes that the leases are not illegal, yet strikes them down because they provide a local operator, who has limited capital, access to a more efficient machine with a minimum investment, thus permitting him to compete more successfully in his local market.

(2) The decree provisions impairing existing leases are punitive and confiscatory.

As early as December 31, 1948, the 70 machines on lease, with a depreciated capital cost of $1,519,573.79, represented over 21% of Besser Co.'s total assets (Ex. 40, R. 1250, 806). Assuming minimum rentals, these leases involved some $30,000 monthly income. These lease rentals, with other assets, were pledged as collateral for outstanding bank loans of $1,150,000 (Ex. 40, R. 1250, 806).

By the judgment striking down all existing leases, Besser Co. was to be thrown into chaos for nearly 18 months, from its entry on April 12, 1951 to the expiration of the lessee's election date October 1, 1952. How many lessees would elect to cancel? When would they give their notices and when would they be effective? What receipts would be available to maintain current operations and service maturing bank loans? Of the (indefinite) number cancelling, how many would insist on purchasing? Was there a right to purchase? The judgment said this was one option "as mutually satisfactory to the parties concerned," but the trial judge was vehement that the judgment did not compel Besser to sell (R. 1082, 1084-5). How many new machines should be produced, and how many leased ones would come back to inventory? These and many other questions, decisive in material purchases, production scheduling, employment policies, sales effort, and financial management, were to be unanswered and unanswerable for 18 months.

To uncertainty there was added arbitrariness.

The trial court did not condemn the lease system or prohibit its continuance: only the leases made on or prior to April 12, 1951 were encumbered with the option of cancellation. Nothing in the record accords any such magic to the date April 12, 1951. The leasing system in itself is a proper and appropriate method of distribution. If, because it makes available to the customer a highly efficient machine with a minimum cash outlay, it brings to Besser Co. a larger demand, that is no more than the proper reward in a com-

petitive market for business initiative. No basis exists in the record, the findings, or the conclusions for striking down the leases which were in effect on April 12, 1951.

(3) This Court has previously condemned analogous decree provisions.

In *Hartford-Empire Co.* v. *United States*, 323 U. S. 386 (1945), this Court ordered deleted from the trial court's judgment a provision of similar import. This becomes especially significant when one considers the violations found in the *Hartford-Empire* case, greatly overshadowing any impropriety of these appellants. Indeed, by its huge aggregation of patents, Hartford had made it "impossible" to get some of the basic machines of the industry except on lease (see *United States* v. *Hartford-Empire Co.*, 46 F. Supp. 541 at 552, 613, 618 (N. D. Ohio, 1942)). The court, admitting that a leasing system might be perfectly legal (*id.*, at page 621), ordered that all future distribution of machinery be by sale at a reasonable price and required the cancellation of all existing leases and an offer of sale to all existing lessees (*ibid*).

This Court described the Hartford leasing system as follows (323 U. S. at 409):

> "The licensing system of Hartford remained that of leasing machinery built for it embodying the patented inventions. Rentals consisted of standard royalties on production. Under this system Hartford rendered a service in the repair, maintenance, and protection of the machines, which is valuable, if not essential to the users. This was the status with which the court had to deal."

This Court pointed out that leasing machines was an appropriate and legal method of distribution (see *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 57-58, 64-65 (1918); *International Salt Co.* v. *United States*, 332 U. S. 392, 398 (1947); *International Machines Corp.* v. *United States*, 298 U. S. 131 (1936)); that the Government

had not attacked the validity of Hartford's patents[6] nor the reasonableness of the royalties under the leases; that the leases were now unrestricted in any way; and that any remaining offensive provisions could be cancelled (see 323 U. S., at 412-414).

This Court then held that the provisions of the decree were confiscatory and went "beyond what is required to dissolve the combination and prevent future combinations of like character" (323 U. S. at 414).

The Court thereupon ordered the offending paragraphs eliminated (323 U. S. at 419).

Thus, in a case exhibiting absolute control by one concern over an entire industry, this Court refused to require the cancellation of existing leases with an offer of a new one or a right to buy the leased machines. In the instant case such a provision is even less defensible. The leases contained no restrictive clauses such as have previously been invalidated [cf. *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *International Machines Corp.* v. *United States*, 298 U. S. 131 (1936); *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451, 460-462 (1922); see 38 Stat. 731, 15 U. S. C. §14]. There is no indication that Besser lessees were forced to lease a Besser machine rather than purchase a different Besser model or the machine of a competitor. As a legal business arrangement, Besser Company is most assuredly entitled to continue its leasing program (see *Hartford-Empire Co.* v. *United States*, 323 U. S. at 420).

Regardless of the government's desire to impose this condition on appellants as a penalty for antitrust violations, the courts have so far refused to sanction it on the ground that leasing programs are lawful and that a decree should not go beyond what Congress has provided in the way of remedies. As this Court said in similar circum-

[6] Similarly, the government concedes that the validity of patents is not in issue on this appeal.

stances in *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, at 728-729 (1944):

> "Congress has been liberal in enacting remedies to enforce the anti-monopoly statutes. But in no instance has it indicated an intention to interfere with ordinary commercial practices."

The provision requiring appellant Besser Company to grant the lessees an option to withdraw and to buy the leased machines is an unwarranted and inappropriate provision in the final judgment and should be stricken.

C. Compulsory licensing of present and future patents.

Appellants assign error to the provision of the final judgment requiring them and two of their co-defendants (*inexplicably omitting Stearns*) "to grant to any applicant therefor a non-exclusive license to make, use and vend concrete block making machinery under any, some or all patents and patent applications pertaining to concrete block making machinery now owned or controlled by the defendant [sic], or which are issued or applied for within ten years from the entry of this final judgment" (R. 1066). Going even further, the provision enjoins defendants (again with the omission of Stearns) "from including any restrictions or condition whatsoever in any license or sub-license granted by or pursuant to the provisions" of the judgment (R. 1066-7). Neither of these requirements is necessary or appropriate in this case.

(1) Present patents.

The addition of compulsory licensing of patents to the judicial armory as an appropriate weapon against Sherman Act violations stems from *Hartford-Empire Co.* v. *United States*, 323 U. S. 386 (1945). In its Memorandum on Burdens, Proof and Scope filed in that case in the district court on November 4, 1946 the government said:

> "As far as is known, there has been no previous proceeding determining the value of (i.e., reasonable

> royalty for) a group of patents *owned by a company which has been adjudicated in an antitrust suit to hold an illegal patent monopoly* (italics added).

The compulsory licensing of patents is an extreme and drastic remedy for antitrust violations, as is shown by the fact that it has been sanctioned by this Court only in cases where huge corporate aggregations had been involved in patent monopolization implemented by long standing and intricate patent aggregations, patent pooling and cross-licensing, price-fixing and other instruments of control, none of which facts is found in this case.

Hartford-Empire Co. v. *United States*, 323 U. S. 386 (1945);
United States v. *National Lead Co.*, 332 U. S. 319 (1947);
United States v. *United States Gypsum Co.*, 333 U. S. 364 (1948), 340 U. S. 76 (1950).

The *Hartford-Empire* case was the first. With twelve corporate and 101 individual defendants, "the gravamen of the case [was] that the defendants cooperated in obtaining and licensing patents covering glass making machinery, . . . limited and restricted the use of the patented machinery by a network of agreements, and . . . maintained prices for unpatented glassware" (323 U. S. at 392). "Hartford, with the technical and financial aid of others in the conspiracy, had acquired . . . more than 600 patents. These, with over 100 Corning controlled patents, over 60 Owens patents, over 70 Hazel patents, and some 12 Lynch patents, had been, by *cross-licensing agreements*, merged into a *pool* which effectually *controlled the industry*. This control was exercised to *allot production*. . . . The result was that *94%* of the glass containers manufactured in this country on feeders and formers were made on machinery licensed under the *pooled patents*" (323 U. S. at 400, italics added).

While sustaining compulsory licensing on the flagrant patent monopoly proven in the *Hartford-Empire* case, the

Court took pains to point out that Congress frequently had refused to adopt a system of compulsory licensing of patents, had rejected a proposal that antitrust violators be compelled to license at a reasonable royalty all future inventions, and had failed to act upon the recommendation of the Temporary National Economic Committee that it adopt such a system (see 323 U. S. at 417). No Congressional action has been taken on the subject since that decision.

Next came *United States* v. *National Lead Co.*, 332 U. S. 319 (1947), involving two major conspirators who controlled over *90%* of the composite titanium pigments and over *90%* of the pure TiO_2 made in the United States, who had achieved this *monopoly* by a *prolification of patents* in a new industry, who had *cross-licensed* each other under their patents, who had entered into *cartel arrangements to divide the world market,* who for years had *exchanged technical data,* and who by their patents had *controlled and regulated the sale* of titanium pigments and compounds in the United States and throughout the rest of the world. A decree ordering compulsory licenses of existing patents and future patents issued during the *five* years after the decree was sustained.

The harsh and discriminatory nature of the present decree is highlighted by the *National Lead* case. There both defendants were required to license; here Stearns, the original Gelbman licensee and consistently the most aggressive defendant in seeking to enforce the patents, is found equal in guilt with Besser Co. but is exempted from the requirement to license even its present patents. Stearns, for example, has an exclusive license under Gelbman sintering process patents (R. 874). Moreover, the *National Lead* case provided that the defendants compelled to license might make the grant conditioned upon the reciprocal grant of licenses at reasonable royalties on patents owned by the applicant: here the decree forfeits the research and creative ability of Besser Co. and Besser to all their present forty-odd competitors, while leaving every applicant free to block

Besser Co. and Besser from access to any patents of the applicant:

The latest case involving compulsory licenses was the second *United States* v. *United States Gypsum Co.*, 340 U. S. 76 (1950). The nature of the wrongdoing is revealed in the first appeal, 333 U. S. 364 (1948). The defendants had conspired to establish an *industry-wide control* through some *fifty patents and seven applications* of United States Gypsum, with the objective and result of *price fixing, elimination of the production of unpatented products, control of customer selection, the terms of sale, the method of sales* through commission agents, and *the methods of delivery*, all of which were *policed* through a special subsidiary.

In the *Gypsum* case the trial court ordered the compulsory licensing of *existing* patents at reasonable royalties, but declined to grant the government's request for licensing of future patents (see 340 U. S. at 100). This Court, in remanding the cause, sustained the government's request, but left to the trial court the decision as to the period that such right to license new patents should embrace.

This exhausts the cases in which this Court has considered decrees in litigated actions compelling the defendants to grant licenses under existing patents. Consent decree provisions of this character are of little significance, for they represent the outcome of bargaining by defendants whose desire or necessity to avoid the burdensome expense of the average antitrust case has been recognized as an important lever in forcing, without trial, the discontinuance of activities condemned by the Antitrust Division.

ARNOLD, *Bottlenecks of Business* (1940) 210.

None of the litigated cases deals with the rationale behind the assumption of judicial power to order compulsory patent licensing at reasonable royalties. However, the facts of the decisions and the opinions of the district courts make plain that this remedy is applied only to flagrant monopolies acquired by misuse of patents.

In the instant case there is no finding of a patent monopoly. The record shows no aggregation of controlling patents, no patent pooling, no cross-licensing, no price-fixing, no allocation of markets, no industry-wide regulation. Appellants have used their patents in lawful ways for the benefit of their own corporate business and without regard to industry control. No evidence was adduced which indicated, far less proved, that the patents owned by appellants had been improperly acquired or abused in any way. Appellants and their co-defendants have a *bona fide* belief in the validity of the 1942 patent license agreement, and their actions in attempting to prevent infringement of the patents covered therein were based upon this belief.

This is the first case in which the compulsory licensing of patents has been ordered when the only "wrong" of the defendants—if wrong it was—consisted merely in an overzealous effort to prevent infringement of their patent rights. If compulsory licensing is an appropriate remedy on such a record, patent owners are put at their peril when they seek to enforce the rights they believe in good faith are conferred by their patents. If their patents are invalid, compulsory licensing is of no significance. If they are valid, and are subjected to widespread infringement, efforts to enforce them become proof of an unlawful combination or conspiracy, to be punished by forfeiting their patent monopoly to compulsory licensing. Thus a patent owner loses his statutory monopoly: his effort to protect it becomes a ground for dedicating it to his competitors.

Even if it were assumed that the 1942 patent license was invalid, a provision cancelling it and requiring Gelbman and Andrus to grant non-exclusive licenses would be sufficient to prevent future violation of the Antitrust Act. This was the relief outlined in the opinion (R. 1029). There is nothing in the opinion which suggests any reason why the compulsory licensing should be extended to Besser Co. and Besser. Obviously it was an afterthought.

This case bears no resemblance to the instances in which compulsory licensing of patents has been required

(see cases, *supra*, pages 95-97). As long as patents have not been used as a means to acquire a broader control than that granted in the patents, by cross-licensing or market allocations or price-fixing or tie-in sales, there is no excuse for such a drastic provision.

(2) Future patents.

The provision condemning to compulsory licensing all future patents of these appellants for the next ten years is equally indefensible. The net effect is to forfeit the inventive genius of Besser Co. and Besser for the next decade to the industry, while leaving Besser Co. and Besser powerless to secure reciprocal licenses under the developments of the defendant Stearns or any other competitor. For Besser individually, almost seventy years of age, this on ordinary life expectancy tables is a life sentence.

Appellants have been leaders in the industry since its inception, and it is to be expected that they will continue to be leaders in research and development which will result in advances in the art on which they will be entitled to patent protection. This provision as to future patents will hinder rather than encourage competitive research and industry development (cf. *United States* v. *National Lead Co.*, 332 U. S. at 359; *Hartford-Empire Co.* v. *United States*, 323 U. S. at 417-418).

Various provisions of the *Hartford* decree dealt with the acquisition and compulsory licensing of future patents (see *Hartford-Empire Co.* v. *United States*, *supra*, at pp. 417-418, 424, 430-431). In that case, the defendants used their patents to shut out all competitors from the industry unless they paid tribute to Hartford, and the latter used its patents to acquire other patents from its licensees and to "fence off" other threatening improvements. Therefore, some justification existed for preventing the acquisition of future patents unless they were made available to the industry which had been so effectively stifled by Hartford's ruthless patent control and might be so again (see *United States* v. *Hartford-Empire Co.*, 46 F. Supp. 541 at 619 (N. D. Ohio,

1942)). Nevertheless, this Court recognized that the patent owner was being deprived of its usual rights when it said (323 U. S., at 417):

> "Under paragraph 24(b) a defendant hereafter acquiring a patent cannot set the price for its use by others, elect to use it himself and refuse to license it, or to retain it and neither use nor license it. These are options patent owners have always enjoyed."

Thereafter, the Court decided that, as to future patents, the decree should be limited to those covering the basic machines through which the defendants had controlled the entire industry (see 323 U. S. at 417-418). Patents on ancillary processes or machines, analogous to the Besser Wellnitz patent, were to be left free of the compulsory licensing provision (*id.*, at p. 418). As to these latter, the decree was further modified to permit the defendants to retain these patents and refuse to license, or to license them with restrictions (*id.*, at p. 424; *cf. id.* at pp. 430-431). In the instant case, the decree reaches all future patents.

The unreasonable period of ten years is symptomatic of the arbitrariness of this provision. It permits anyone at any time for any reason to demand a license until the last potential patent expires sometime around 1978. Even the decree in the *National Lead* case, in the face of patent monopoly and cross-licensing, provided for such licensing only on patents issued within five years (see *United States* v. *National Lead Co.*, 332 U. S. at 348). In the *Gypsum* case, the relief requested by the government would have permitted the defendants after five years to seek elimination of the provision for licensing of future patents (340 U. S. at 93, 100-103). In *United States* v. *Imperial Chemical Industries*, 100 F. Supp. 504 (S. D. N. Y. 1951), involving an alleged world-wide conspiracy extending over many years, the government is requesting compulsory licensing only on future patents for five years, except in the nylon field where the request is for eight years. No reason exists, in the present case, why a ten year period should be imposed on appellants.

D. Miscellaneous.

In addition to the provisions of the final judgment discussed above, a number of provisions go beyond the extent of appropriate relief.

(1) Purporting to bind the "successors" and "assigns" of defendants.

Paragraph III of the judgment provides:

> "The provisions of this final judgment applicable to any defendant shall apply to such defendant, its subsidiaries, successors, assigns, and each of its officers, directors, agents, employees and any other person acting under, through or for such defendant." (R. 1064)

The scope of an injunctive order is prescribed by Rule 65(d) of the Federal Rules of Civil Procedure: an injunction

> ". . . is binding only upon the parties to the action, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order. . . ."

The decree here departs from the prescription of the Rule. Certain of these deviations seem immaterial, but others are substantial.

The effort to make this judgment reach "successors" and "assigns" is improper. It clouds the right of each defendant to dispose of its or his property to third persons who are wholly unidentified and unidentifiable. It is in no sense dependent upon the existence of any combination or conspiracy or other improper conduct.

(2) Divestiture of Stearns stock within 80 days.

Paragraph IV of the judgment directed Besser Co. and Besser to divest themselves of all stock holdings and other interests, direct or indirect, in Stearns. This divestiture, ordered April 12, was to be consummated on or before July

1, 1951 (R. 1064). Thus a total of 79 days was granted to liquidate an investment of nearly $1,000,000 in the stock of an unlisted corporation.

Appellant Besser Co. does not assign as error the requirement that it divest itself of the Stearns stock. It limits its submission to the proposition that the period prescribed was so unreasonably short as to be confiscatory.

In *United States v. National Lead Co.*, 332 U. S. 319 at 363 (1947), the parties were given one year within which to formulate a plan of divestiture. In the *Hartford-Empire* case, 323 U. S. 386 (1945), individual defendants were given two years within which to divest themselves of certain stock, and this Court found the period too short to insure divestiture without severe loss (*id.* at 426). The decision provided that a longer period should be allowed and suggested an alternative provision preventing the voting of the stock before divestiture or the trusteeing of the same until divestiture should be accomplished (*ibid.*).

The time periods specified by the judgment here gave no opportunity for appeal, and of course have long since expired. A new approach to the problem of divestiture is therefore necessary, and appellants respectfully submit that this Court appropriately may outline procedures, including trusteeing, whereby the claimed "control" of Stearns may be terminated and an adequate period be allowed for the orderly liquidation of this investment.

(3) Provision outlawing exclusive licenses under patents.

Paragraph VI(B) of the judgment perpetually enjoins the defendants "from conveying or receiving any patent rights under any license, contract, agreement or understanding which gives the licensee or licensees control over the number of licenses issued or to be issued."

The net effect of this provision is to enjoin Besser Co. or Besser from ever hereafter granting or receiving an exclusive license of a patent, with the right to sublicense. The prohibition is in no sense qualified by the conception of an

unlawful combination, conspiracy, or monopolization tainting any such future license. In the words of this Court in the *Hartford-Empire* case, this provision perpetually places "the defendants, for the future, 'in a different class than other people'" (323 U. S. at 409). "The injunction as drawn is not directed at any combination, agreement or conspiracy. It binds every defendant forever irrespective of his connection with any other or of the independence of his action" (id. at 413). If Olsen, or Darden, or Milewski, or any other of the numerous competitors of defendant, wants to negotiate for an exclusive license of a patent upon a new development, he may do so. If Besser Co. or Besser, however, having purged themselves of any taint of unlawful conduct, and being engaged in their normal operations, seek to negotiate for such a license, they would be violating this decree.

(4) Prohibition of agreements with "same unlawful purpose and effect" as 1942 license.

Paragraph VI(B), in addition to the clause discussed in the preceding subdivision, enjoins the defendants from granting or conveying patent rights under any agreement "which has the same unlawful purpose and effect as the afore-described license agreement of December 7, 1942" (R. 1066).

This provision should be deleted. If this Court sustains appellants' contention that the 1942 patent license was not unlawful in purpose or effect, the provision in VI(B) obviously falls with its premise. But even if the 1942 license should be condemned, this provision in VI(B) cannot properly be allowed to stand.

The provision is too vague to permit these defendants to know its scope or a court to apply it to a set of facts. It does not prohibit a described type of license, but any contract or agreement with respect to patents which has "the same unlawful purpose and effect" as the 1942 license. A charge of contempt asserting that the defendants, or either of them, had violated the provision would require a full

antitrust trial developing the purpose and intent of the parties.

In short, this provision is merely an injunctive direction that in future patent transactions the defendants shall not violate the antitrust laws. As such, it is "so vague as to put the whole conduct of the defendants' business [in this field of patents] at the peril of a summons for contempt."

Hartford-Empire Co. v. *United States,* 323 U. S. 386 at 410 (1945);
Accord: *Schine Theatres* v. *United States,* 334 U. S. 110 at 125-6 (1948);
Labor Board v. *Express Publishing Co.,* 312 U. S. 426 at 436 (1941);
Swift & Co. v. *United States,* 196 U. S. 375 at 396 (1905).

It is analogous to the provisions of paragraph 9 of the decree in the *Hartford-Empire* case which in effect enjoined any future acts monopolizing or restraining trade "as charged in the complaint" and any future acts "having a tendency to continue or revive any of the aforesaid violations." (*Hartford-Empire* record, p. 7660.) In that case the government agreed to eliminate the provision—a concession "required by statute, by the Rules of Civil Procedure, and by [this Court's] decisions" (323 U. S. at 410).

(5) Provision that judgment not limit contests of validity of patents or import value.

Paragraph VII(D) of the judgment provides that nothing in the decree "shall prevent any applicant from attacking in the aforesaid proceedings, the validity or scope of any of the patents, nor shall this final judgment be construed as importing any validity or value to any of the said patents" (R. 1067).

The reference to "aforesaid proceedings" is not clear. The proceedings referred to in the prior subparagraphs of Paragraph VII are those for setting royalty rates and

terms by an extra judicial "committee" of lay "arbitrators" (attacked in Point VI hereof). Surely no "applicant" would be contesting the validity or scope of the patents before the committee. Perhaps the reference is intended to reach to the patent infringement actions mentioned in Paragraph VI.

In any event, the provision is improper. Less than five months prior to the judgment in this case, this Court had rejected the request of the government to insert a similar clause in the *Gypsum Co.* decree. *United States* v. *United States Gypsum Co.*, 340 U. S. 76 at 94 (1950).

(6) Prohibition of ancillary covenants.

Paragraph IX of the judgment prohibits the appellants, regardless of circumstances, from

> "... entering into, adhering to or claiming any rights under any contract, agreement or understanding with any person presently or hereinafter engaged in the development or manufacture of concrete block making machinery which has *the purpose or effect* of preventing such person, or any other person from competing with defendants, or any of them in the development, manufacture or sale of concrete block making machinery." (R. 1068).

Again, this provision goes far beyond the relief appropriate to this case. We do not suggest its deletion, but we believe a modification necessary to prevent the outlawing of ancillary covenants the validity of which, absent combination or conspiracy, would not be questioned.

Assume that Besser Co. enters into a contract to acquire the business or assets of someone engaged in the business. Such a contract would have to be submitted to the Court for its approval (see Paragraph V of the judgment, R. 1065, not questioned on appeal). There is no question that an ancillary covenant in contracts of sale, when reasonable in space and time, is valid, and the vendor's right to enter into such a contract will often affect directly the price at which he can sell. Is there any reason why there should

not be such a provision in a contract to be approved by the Court?

Moreover, the provisions of Paragraph IX, above quoted, share the error already noted in discussing Paragraph VI(B): they outlaw contracts having a described "purpose or effect." This provision is so vague that it would turn a charge of contempt into a full-dress antitrust trial exploring the motives and intents of the parties and the impact of their agreements after they had entered into it. The proper objective of the provision can be accomplished by a requirement of court approval.

Specifically, appellants propose that an appropriate substitute for Paragraph IX might be worded substantially as follows:

> "Defendants are jointly and severally enjoined and restrained from entering into, adhering to or claiming any rights under any contract, agreement or understanding with any person engaged in the development or manufacture of concrete block making machinery which prohibits or restricts such person, or any other person, from competing with defendants or any of them in the development, manufacture, or sale of concrete block making machinery; unless such contract, agreement, or understanding shall have been approved by this Court pursuant to the following:
>
> (A) a copy of any existing contract, agreement or understanding which the defendant desires to have submitted for approval shall be filed in this Court within 60 days of the entry of this judgment;
>
> (B) a copy of any new contract, agreement, or understanding which defendant desires to enter into shall be filed with this Court before it is executed;
>
> (C) a copy of any contract, agreement, or understanding which defendant hereafter, by the acquisition of assets or otherwise, becomes entitled to enforce shall be filed in this Court within 90 days after the defendant becomes entitled thereto;

(D) the copy or copies so filed shall be accompanied by a motion seeking the approval of this Court of such contract, agreement, or understanding; reasonable notice of such motion shall be given the Attorney General, who shall have an opportunity to be heard; and

(E) such motion shall be granted if, but only if, on such hearing the moving defendant shall show this Court that such contract is a proper ancillary covenant which does not unreasonably restrain trade or otherwise violate the antitrust laws."

The proposed modification will effectively accomplish the objectives of the government in this action. It imposes a burden of proof on the defendant to justify the agreement where a valid ancillary covenant is important to its legitimate business operations. It avoids the error, now found in the judgment, of perpetually outlawing, regardless of circumstances, what are entirely proper covenants in appropriate situations. It thus protects the public interest while recognizing the right of the defendants to conduct their business operations along normal lines.

Substitution of the proposed language for present Paragraph IX would suggest the desirability of a slight modification in Paragraph X to avoid inconsistency. There should be inserted in Paragraph X, in the reference to "influencing" any person to refrain from manufacturing concrete machinery, a parenthetical clause: "(other than in compliance with a contract, agreement, or understanding approved by the Court under Paragraph IX)."

POINT VI

The committee-arbitrator procedure employed to set royalties on the compulsory licenses of patents denied the appellants due process of law.

We have summarized above (*supra*, pages 43-52) the extraordinary proceedings which were followed in fixing the royalties to be paid on the compulsory licenses of existing patents, and which the judgment contemplates will be followed during the next decade on all future patents of these appellants. A "committee" of "arbitrators" was established, two "arbitrators" were designated by the government, two by the appellants acting under protest, the judge doffed his judicial role to serve as a fifth "arbitrator", requests for an opportunity to present relevant evidence were denied, and by a 3-2 vote the figures proposed by the government representatives, who were themselves potential licensees, were imposed on the appellants. The impropriety of this procedure is manifest.

When patents are subjected to compulsory licenses at reasonable royalties, important assets of the owner are opened to his competitors. For instance, in this case the Wellnitz patent, which was under development, already represented an investment—as best we can tell from the scant information available incident to its cavalier treatment by the "arbitration committee"—of some $275,000 (R. 1098-1100). Whether a patent be viewed as a property or a privilege, it is indisputably an asset which may possess great value.

Appellants endorse, with an earnestness informed by the irresponsibility of the post-judgment proceedings in this case, the cautionary comment of Judge Kloeb in the *Hartford-Empire* case (65 F. Supp. 271 at 274 (N. D. Ohio, 1946)):

> ". . . What are reasonable terms in a given industry for a license to manufacture and sell [or make or

use] certain inventions cannot be arrived at through mathematical formula, *nor should they be arrived at through arbitrary judgment or mere guess work*" (Emphasis added.)

What constitutes a "reasonable" royalty is a justiciable issue of fact on which the interested parties are entitled to decision in accordance with the fundamental principles of due process. The difficulty of computing such royalties has been widely recognized.

> Hearings before Committee on Patents on H. R. 23,417, 62nd Congress, 2d Session (1912) Part XII, 10-11;
>
> Report of Subcommittee of American Bar Association to consider King Bill, S. 383, 74th Congress (1935) p. 38.

Lacking any precedent for the determination of "reasonable royalties" under an antitrust decree, the trial court in the *Hartford-Empire* case, after the remand, resorted to the analogy of the rule in infringement cases (65 F. Supp. 271 (N. D. Ohio, 1946)). It quoted *Reynolds Spring Co.* v. *L. A. Young Industries, Inc.*, 101 F. 2d 257 at 261 (6th Cir., 1939):

> ". . . the sum allowed should be reasonable and that which would be accepted by a prudent licensee who wished to obtain a license but was not so compelled and a prudent patentee who wished to grant a license, but was not so compelled."

A somewhat similar statement is found in *A. Mecky Co.* v. *Garton Toy Co.*, 277 Fed. 507, 511 (E. D. Wisc., 1921):

> ". . . terms should be discussed which would enable, and not forbid, the [licensee's] acceptance thereof, and which the . . . patentee should desire to be accepted, and not rejected, *to the end that, as patentee, it receive reasonable remuneration . . . Clearly the terms must be such as exhibit the right of the patentee to reasonable pecuniary reward for the*

use, but not such as, because of their severity, would simply intrench him in his monopoly by forbidding even an agreed use" (Emphasis added.)

An informal suggestion by the Court that the parties make an effort to agree on a reasonable royalty was the initial approach of Judge Kloeb in the *Hartford-Empire* case (See 65 F. Supp. at 276). This, of course, is not objectionable. What is imperative, if our courts are to remain instruments for the administration of justice in accordance with the fundamental principles of due process, is that, given a disagreement as to rates, the determination be made in judicial proceedings based on the hearing and evaluation of evidence in the light of appropriate criteria. The complete abandonment of such essential safeguards is complained of here.

The appropriate procedure is well established, was recognized in the form of judgment proposed by the government (R. 1060), and no excuse can be suggested for the failure of the district court to follow it.

The normal procedures of judicial administration, involving the receipt and evaluation of relevant evidence and the making of findings thereon, are as necessary here as in any other aspect of the case. This is clearly implicit in the language of *United States* v. *National Lead Co.*, 332 U. S. 319 at 351 (1947). It was obviously such a hearing that this Court envisaged in the second *Gypsum* case, when the Court, in considering the establishment of a reasonable royalty, left open the questions of "where the burden of proof of value lies or who has the duty to go forward with the evidence . . ." (340 U. S. at 94). These are words of art which refer to a hearing, evidence, and proof.

The judge himself may conduct appropriate hearings on the issue. This was the government's proposal below (R. 1060). It was the method followed in *United States* v. *American Optical Co.*, 95 F. Supp. 771 (S. D. N. Y., 1950). Or in his discretion the judge may delegate the task to a special master, appointed under Rule 53 of the Federal

Rules of Civil Procedure, to "*take testimony* and report to the Court his conclusions, *grounded on such factual basis*" (*United States* v. *Hartford-Empire Co.*, 65 F. Supp. 271 at 276 (N. D. Ohio, 1946)). Reference to a master also was employed in *United States* v. *Vehicular Parking Co.* (D. Del., Reference Order of Oct. 19, 1948, not reported).

The cases are numberless indicating that the determination of such reasonable royalty is a formal matter for the district court either with or without the assistance of a special master.

See *e.g.*, *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.*, 235 U. S. 641 (1915);
The Suffolk Co. v. *Hayden*, 3 Wall. (70 U. S.) 315 (1865);
Reynolds Spring Co. v. *L. A. Young Industries*, 101 F. 2d 257 (6th Cir., 1939);
Austin-Western Road Machinery Co. v. *Disc G. & P. Co.*, 291 Fed. 301 (8th Cir., 1923), cert. den. 263 U. S. 717 (1924);
United States v. *Hartford-Empire Co.*, 65 F. Supp. 271 (N. D. Ohio, 1946);
Consolidated Rubber Tire Co. v. *Diamond Rubber Co.*, 226 Fed. 455 (S. D. N. Y., 1915), aff'd 232 Fed. 475 (2nd Cir., 1916).

Neither procedure was followed here.

It should be unnecessary to mention that the master, being an officer of court, should possess no disqualifying interest or bias. Canon 12 of the Code of Judicial Ethics of the American Bar Association states mere truisms when it prescribes that:

> "Masters, referees . . . and other persons appointed by a judge to aid in the administration of justice should have the strictest . . . impartiality . . . [The judge] should not permit his appointments to be controlled by others than himself . . ."

This Canon, declarative of principles of judicial decorum basic to the administration of justice, was flagrantly disregarded. Certainly neither Olsen nor Darden, or for that matter neither Rosenthaler nor Stark, possessed the disinterest required of masters or appointees to aid in the administration of justice in this case. Olsen and Darden, the government's designees, were inherently disqualified: aside from the fact that they were two of the principal government witnesses, both were competitors of appellants and directly and pecuniarily interested as potential licensees. Apparently the government felt some qualms, as suggested by the meticulous manner in which its "designation" renounced any responsibility for the procedure (R. 1070). Such a renunciation contrasts sharply with the diligence of the government in presenting relevant facts to the master in the *Hartford-Empire* case in a proceeding, the transcript of which exceeded 1250 pages.

When the judge elects to determine, or designates a master to report, the royalty rate, the parties are entitled to present relevant evidence at a hearing conducted in accord with the minimum requirements of due process (Fed. R. Civ. Proc. 53(d)(1). Judge Kloeb in the *Hartford-Empire* case (65 F. Supp. at 275) commented that he had "no criteria to govern him in arriving at a definition of 'reasonable terms' in this particular industry and for this kind and class of machinery." Judge Picard evidenced no such judicial caution. Though the record reflects his complete lack of knowledge on the subject of the Wellnitz patent, and his inadequate information on the Scott patent, he declined repeated requests of appellants for an opportunity to present evidence, declared he did not want to hear it, and proceeded to cast his uninformed but deciding vote for the adoption by the "arbitrators" of figures set by the government representatives who were themselves disqualified by bias and interest. We confess difficulty in finding relevant citations as to the impropriety of this procedure, but our inability stems from the fact that our research uncovered no

case in which a judge of any court, state or federal, heretofore had so departed from the standards of judicial propriety.

When a master is appointed, the parties are entitled to subpoena witnesses (Rule 53(d)(2)). They are entitled to interrogate adverse witnesses. If the judge acts, they are entitled to the same availability of proof and cross examination.

At the hearing, which these appellants were denied, it is the function of the judge or master to consider relevant evidence.

> "Such evidence would be directed to the character of the invention, costs of manufacture, costs of marketing, sales prices, demand, etc. Royalties paid in more or less similar situations would be considered, although the weight of such evidence in any particular case might be slight." *Austin-Western Road Machinery Co.* v. *Disc Grader & Plow Co.*, 291 Fed. 301 at 305 (8th Cir., 1923), cert. den. 263 U. S. 717 (1924).

Such evidence might appropriately include: the cost of research, engineering, drafting, and counsel fees prior to the issuance of the patent; the cost of the patent where purchased from another; the cost of research and development expended and to be expended in the commercial utilization of the patent; the advantages of a machine employing the patent, e.g., savings attributable to use of the invention, greater productive capacity, cost savings on the same product, improvement in quality of the product; the advantages of the patented device or method over the next most satisfactory substitute used as a standard of comparison; the cost of manufacture and the anticipated or actual sales price of the patented article, and the apportionment, if any, appropriate as between the patented device and the balance of the article; the adaptability of the patented apparatus, process or method to various types of machines; and the anticipated number of machines which will use the patent

during its remaining life, including the feasibility of applying the patent development to existing machines.

These are typical of types of information pertinent to the evaluation of a proposed royalty rate. All have been taken from one or more of the many reported cases dealing with the determination of reasonable royalties on patents. All, perhaps, are embraced in the succinct direction of *Dowagiac Manufacturing Co.* v. *Minnesota Plow Co.*, 235 U. S. 641, 648 (1915) to consider "the nature of the invention, its utility and advantages, and the extent of the use involved." Not one of these pertinent aspects was developed in testimony below; and the great majority were not even mentioned in the informal "committee" meetings at which as one "arbitrator" Judge Picard was present and cast his deciding vote.

When a master acts, the parties are entitled to have a report on the matters submitted to him (Rule 53(e)(1)). The parties are entitled to file objections thereto, and have a judicial review thereof (Rule 53(e)(2)). If the judge acts, they are entitled to have him "find the facts specially" (Rule 52(a)) and are entitled to judicial review thereof (Rule 52(b)). Here the "report" consisted merely of a license form setting forth the royalty rates and terms, voted 3-2 by the "arbitrators" (R. 1112).

If we are correct in our view that the judgment erred in compelling the appellants Besser Co. and Besser compulsorily to license all their existing patents, the provision for royalties falls automatically.

But even if the compulsory licensing of present patents be sustained, the rates purported to be established pursuant to the arbitrary committee procedure cannot be allowed to stand.

Conclusion

WHEREFORE, the appellants respectfully submit that upon this appeal, this Court should:

(a) set aside the findings of fact herein shown to be clearly erroneous;

(b) set aside the judgment below; and

(c) remand this cause to the trial court, with instructions to modify the judgment so that it will be limited to relief appropriate to such findings as are not set aside.

Respectfully submitted,

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